

***United States Court of Appeals
for the
District of Columbia Circuit***



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BRIEF FOR APPELLANT

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,379

KOWL, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

EMERALD BROADCASTING COMPANY, (KTHO)
Intervenor.

On Appeal from a Memorandum Opinion and Order
of the Federal Communications Commission

United States Court of Appeals
for the District of Columbia Circuit

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BRIEF FOR APPELLANT

STATEMENT OF ISSUE PRESENTED*

Whether questions raised in sworn petitions against the subject application were "material and substantial," within the meaning of Section 309(d) of the Communications Act of 1934, *as amended*, 47 U.S.C. 309(d), so as to make it

* The pending case has not been before this Court at any other time.

mandatory for the Commission to make a detailed analysis and issue a concise statement to resolve the questions, or else set those questions down for evidentiary hearing.

REFERENCES TO RULINGS

Commission Memorandum Opinion and Order, Emerald Broadcasting Company (KTHO), FCC 70-538, adopted May 20, 1970, released May 25, 1970, corrected version released June 1, 1970. 23 FCC 2d 178, 19 RR 2d 149 (1970).

STATEMENT OF THE CASE

This is an appeal from an action of the Federal Communications Commission granting without evidentiary hearing an application of a standard broadcast station for major changes.

A. THE PARTIES TO THE ACTION

KOWL, Inc. (KOWL), appellant here, is the licensee of standard broadcast station KOWL located in South Lake Tahoe, California, operating fulltime on 1490 kHz.

Emerald Broadcasting Co. (KTHO), applicant below and intervenor here, is the licensee of standard broadcast station KTHO, also situated in South Lake Tahoe, California, and presently operating on daytime status. In 1966, during the pendency of the application here involved, KTHO began operation of a fulltime frequency modulation (FM) broadcast station in South Lake, Tahoe.

The Federal Communications Commission (Commission), appellee here, by the Communications Act of 1934 (Act), 48 Stat. 1085, *as amended*, is charged with regulating interstate and foreign commerce in communication by wire and radio under Title 1 of the Act. The Commission is located in Washington, D.C.

B. THE PROCEEDINGS BELOW

On two separate occasions, KTHO filed with the Commission applications for nighttime operation on 590 kHz with 500 watts power, directional antenna, in South Lake Tahoe, California.¹

KTHO tendered its initial application for a change of its existing transmitter site and for extended AM operating hours to the Commission on October 22, 1965. Timely intercession by KOWL via its March 2, 1966, "Petition to Deny Acceptance for Filing and Return of Application" initiated the process of Commission deliberation which resulted in grant of only the non-nighttime portion of that application.²

In order to resuscitate the request for nighttime AM operation, KTHO filed, on October 17, 1967, its second application, with engineering specifications identical to its predecessor's. This application, solely devoted to the nighttime aspect, was subsequently amended by KTHO several times.

KOWL introduced on April 1, 1968, a timely "Petition to Deny" this application. Throughout the exchange of pleadings which ensued, KOWL questioned the efficacy of a Commission grant from the vantage point of advancing

¹ During the pendency of this proceeding, some four small communities were merged to become the community of South Lake Tahoe. Tahoe Valley, to which KTHO formerly was licensed, was one of those merging communities.

² The proposal for nighttime operation was found to be mutually exclusive with a then pending application for Circle L, Inc. (station KCRL) for construction of a Class II-A standard broadcast station at Reno, Nevada, operating on 780 kHz. As the KTHO proposal was tendered for filing some three months after the KCRL application was designated for hearing, KTHO's proposal was not timely filed for consolidation and thereby subject to dismissal under Section 1.227(b)(4) of the Commission's rules.

However, since KTHO's nighttime proposal was coupled with the uncontested request for a change of transmitter site applicable to the existing daytime operation, the Commission granted the site change portion of the proposal. *Emerald Broadcasting Co. (KTHO)*, 8 FCC 2d 443, 10 RR 2d 267 (1967).

the public interest,³ and prayed that a public hearing be held. Citing the KTHO practices of selling air time at rates substantially below its published rate card and other KTHO business practices which, in KOWL's judgment, were unprofessional, KOWL raised three grounds which it maintained require an evidentiary hearing be held on the application.

The Commission in a Memorandum Opinion and Order, 70-538, adopted May 20, 1970, released May 25, 1970, corrected version released June 1, 1970, 23 FCC 2d 178, 19 RR 2d 149 (1970),⁴ granted the KTHO application without an evidentiary hearing. One Commissioner concurred in the result, another dissented. Notice of Appeal was filed with this Court by KOWL on June 23, 1970.

SUMMARY OF ARGUMENT

Where, as here, substantial and material questions of fact are raised, the Commission is obliged under the Act and this Court's teachings to bring to bear upon the problems so presented a detailed analysis and to issue a concise statement of reasons disposing of them. Where substantial and material questions remain after that analysis, it is the Commission's duty to set them down for evidentiary hearing. Section 309(d)(2) of the Act, 47 U.S.C., §309(d)(2); *Southwestern Operating Co. v. F.C.C.*, 122 U.S. App. D.C. 137, 351 F.2d 834 (1965); *West Michigan Telecasters, Inc. v. F.C.C.*, 130 U.S. App. D.C. 39, 396 F.2d 688 (1968).

KOWL raised, under oath, before the Commission questions going to the character qualifications of KTHO. Included under this requested issue were

³ Under Section 309(a) of the Communications Act of 1934, 48 Stat. 1085, *as amended*, 47 U.S.C. 309(a), the Commission is charged with determining "whether the public interest, convenience, and necessity will be served by the granting of such application. . .".

⁴ Where possible, citations will be made herein to the FCC Reports. The dual citation to "RR" or "RR 2d" is to Pike & Fischer Radio Regulation.

averments that KTHO had puffed up and misstated the facts in certain of its Commission filings, had *sub silentio* attempted to palm off its own employees on the Commission as disinterested members of the public, and had misrepresented certain contacts with local community leaders — contacts which were repudiated by the leaders themselves. This character issue request was given primary emphasis by KOWL because it is held to be of such importance in passing upon qualifications to become or to continue as a licensee. Section 308(b) of the Act, 47 U.S.C. §308(b); *Washington Broadcasting Co.*, 2 FCC 2d 952, 7 RR 2d 123, *reconsideration denied*, 3 FCC 2d 777, 7 RR 2d 601 (1966). Rather than face up to these sharply drawn factual questions as is its custom, *WMOZ, Inc.*, 36 FCC 201, 1 RR 2d 801, 849 (1964); *Carbon Emery Broadcasting Co.*, 22 FCC 587, 12 RR 1268 (1957); *F.C.C. v. WOKO, Inc.*, 329 U.S. 223 (1946); *The Walmac Co.*, 36 FCC 507, 2 RR 2d 145 (1964); *Northwestern Communications Corporation*, Docket No. 18669, FCC 70-567 (June 2, 1970), the Commission used vague language to portray, in generality, only one aspect of the question and drew no conclusion whatever.

On the second question raised, the question of the applicant's efforts to ascertain the needs, interests and problems of the area to be served, the Commission invited amendments, then failed to follow its own precedents in analyzing the presentation. *Minshall Broadcasting Co.*, 11 FCC 2d 796 (1968), *Public Notice Relating to Ascertainment of Community Needs*, FCC 68-847, released August 22, 1968, 33 FR 12113, *Notice of Inquiry In re Primer on Ascertainment of Community Problems*, FCC 69-1402 (1969). Had it analyzed the presentation, the Commission would have been forced to the conclusion that KTHO's efforts — made after it had been warned that more was needed — were mere window dressing. This is so because, although the efforts mainly relied upon by the Commission (Amendment of April, 1970) found and defined many new needs and problems, not one minute of additional air time was provided to respond to the new needs.

In the area of financial qualifications the Commission omitted any finding as to the additional expenses of operation under the proposed facilities.

Its allusion to financial reports filed with it by KTHO, but classified secret, and to the financial statements of KTHO principals were makeweight. The record shows a *particular need* for updated financial statements from the principals and, as stated, it is not known what additional expenses the principals must meet. Cf. Section 308(b) of the Act, 47 U.S.C. §308(b); *Ultravision Broadcasting Co.*, 1 FCC 2d 544, 5 RR 2d 343 (1965); *West Michigan Telecasters, Inc. v. F.C.C.*, 130 U.S. App. D.C. 39, 396 F.2d 688 (1968); *Jackson Missouri Broadcasting Co.*, unreported FCC Reports, 14 RR 2d 445 (Rev. Bd., 1968).

In a sentence, the Commission's Order reveals an abject failure to specify the reasons for turning aside sworn averments concerning facts substantial and material to public interest resolution. In two areas the Commission impermissibly glossed over the subject; in another (character), it omitted entirely any real treatment. The Order should be reversed.

ARGUMENT

A. THE COMMISSION'S STATUTORY MANDATE AND JUDICIAL REVIEW

The Communications Act empowers the Commission to authorize expansion of AM service to include nighttime operation without an evidentiary hearing only if it correctly finds that:

- (1) "no substantial and material question of fact" is presented in the application and pleadings, and
- (2) that "the public interest, convenience and necessity will be served by the granting of such application."⁵

Conversely, should substantial and material questions of fact be presented, or if for any reason the Commission is unable to find that the public interest

⁵ Section 309(d)(2) of the Communications Act of 1934, 48 Stat. 1085, *as amended*, 47 U.S.C., §309(d)(2).

would clearly be served by a grant of the application, it is, by law, required to designate such application for an evidentiary hearing.⁶ For the Commission to grant the KTHO application without an evidentiary hearing in the face of both substantial and material questions of fact in separate areas of inquiry all affective of the public interest was reversible error. The Commission's Memorandum Opinion and Order compounded this initial error by its failure to set forth with convincing clarity and precision its findings and the reasons for its decision. The importance of the requirement is inherent in the doctrine of judicial review which places only limited discretion in the reviewing Court.⁷

The United States Supreme Court, per Justice Harlan, observed in the *Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968):

"The Court's responsibility is not to supplant [a] Commission's balance of . . . competing interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors. Judicial review of the Commission's orders will therefore function accurately and efficaciously only if the Commission indicates fully and carefully the methods by which, and the purposes for which, it has chosen to act, as well as its assessment of the consequences of its orders for the character and future development of the industry."

To be sure, agency opinions are not required to be letter perfect, but for a reviewing Court to exercise *its* function, the findings and reasons underlying agency conclusions must be set out. Here, under Section 309(d)(2) of the Communications Act, *as amended*, the Commission expressly is directed to issue a "concise statement" disposing of all substantial issues raised by a Petition

⁶ *Southwestern Operating Co. v. F.C.C.*, 122 U.S. App. D.C. 137, 351 F.2d 834 (1965).

⁷ *WAIT Radio v. F.C.C.*, 135 U.S. App. D.C. 317, 418 F.2d 1153 (1969).

to Deny. The Commission's vague opinion here — its failure to come to grips with the questions presented — represents action arbitrary, capricious and prejudicial to KOWL and, more important, the public interest.

B. THE AREAS OF CHALLENGE

KOWL directly challenged three aspects of the KTHO application.

1. KOWL demonstrated, based upon allegations of fact, that KTHO's representations, made in the course of collating and presenting to the Commission data under the requirement to ascertain needs and problems of the listening public, evinced a lack of requisite character qualification.⁸ An attempt to mislead the Commission or a deliberate misrepresentation is a matter bearing upon one's character qualifications and thus is material to whether the application should be granted. See *Washington Broadcasting Co.*, 2 FCC 2d 952, 7 RR 2d 123, *reconsideration denied*, 3 FCC 2d 777, 7 RR 2d 601 (1966).

2. KOWL demonstrated, based upon allegations of fact, that KTHO's attempts to ascertain the needs and problems of the community of license and subsidiary service areas failed to conform to existing Commission standards. The failure to meet Commission requirements in this connection is a matter material to whether a grant of the application would be consistent with the public interest. *In re Report and Statement of Policy Re: Commission En Banc Programming Inquiry*, 20 RR 1901; *In re Suburban Broadcasters*, 30 FCC 1021, 20 RR 951, *aff'd sub nom Henry v. F.C.C.*, 112 U.S. App. D.C. 257, 302 F.2d 191 (1961) *cert. denied*, 371 U.S. 821 (1962).

3. KOWL demonstrated, based upon allegations of fact, that KTHO had not presented facts sufficient to warrant a finding it was financially qualified.

⁸ Section 308(b) of the Communications Act of 1934, 48 Stat. 1084, *as amended*, 47 U.S.C. §308(b) provides "All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical and other qualifications of the applicant to operate the station"

This question also is material to whether a grant would serve the public interest. Section 308(b) of the Act, 47 U.S.C., §308(b); *In re Ultravision Broadcasting Co.*, 1 FCC 2d 544, 5 RR 2d 343 (1965).

Each of the three areas challenged by KOWL involved issues that went to the heart of the KTHO application. These issues, as stated above, were "material" to a proper determination of whether the public interest, convenience and necessity would be served by the grant of the KTHO application. The basic threshold question is reduced, then, to whether the specific KOWL allegations of fact on any one issue raised a question which was "substantial." The argument to follow shows substantial questions of fact that merited, even required, rational resolution. KOWL contends that had the Commission made the required detailed analysis, it would have found that substantial questions not only were raised, but remained for resolution in evidentiary hearing. The Commission's failure to make the mandatory concise resolving statements or provide reasoned analysis requires reversal.

1. Substantial Questions of Unresolved Fact Were Raised Bearing Upon the Character Qualifications of KTHO

- a. The Adjudicatory Standard Employed in Resolution of Character Questions

It has been repeatedly held that a willingness to deceive the Commission, even as to matters unimportant in themselves, is ground for administrative sanction. *WMOZ, Inc.*, 36 FCC 201, 1 RR 2d 849 (1964), *Eleven Ten Broadcasting Corp.*, 32 FCC 706, 22 RR 699 (1962), *aff'd sub nom Immaculate Conception Church v. F.C.C.*, 116 U.S. App. D.C. 73, 320 F.2d 795 (1963).

The Commission has for years put all applicants and licensees on notice as to the high degree of integrity it demands of them:

The Communications Act of 1934, as amended, contemplates that applicants for a permit or license shall establish

those qualifications which would support a finding that a grant to them would serve the public interest. This of necessity presupposes a candid, honest and complete disclosure as to all facts underlying the application and deemed by the Commission to be essential.⁹

The Commission's corps of Hearing Examiners is well aware of the importance attached to this:

"The Commission's ability to fulfill its statutory responsibilities in the area of radio and television broadcasting rests in considerable measure on its being able to rely upon each of those whom it licenses to observe conscientiously the rules of the Commission and the applicable license terms and conditions. It is, likewise, fundamental to the regulatory process that the Commission be able to rely on the representations of those whom it licenses and those who come seeking licenses. Therefore, the Commission must demand candor from those who come before it and must refuse to tolerate deliberate misrepresentations." *Nick J. Chaconas*, unreported in FCC Reports, 16 RR 2d 583, 607 (Int. Dec., 1969).

The United States Supreme Court spoke directly to the heart of the character qualification requirement when it stated:

"The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones."¹⁰

It is this "willingness to deceive" rather than the effect of falsification or lack of candor on the success or failure of the application which constitutes the gravamen of the offense.

While it is not the function of the Commission to punish applicants, or their principals, for even past misdeeds, *per se*, it is:

⁹ *Carbon Emery Broadcasting Co.*, 12 RR 1268c, (Int. Dec. 1955); *aff'd* 12 RR 1268 (1957).

¹⁰ *F.C.C. v. WOKO, Inc.*, 329 U.S. 223, 227 (1946).

" . . . appropriate and necessary for the Commission to examine an applicant's past conduct in order to determine the nature of applicant's probable future performance as a licensee and the likelihood that applicant will operate its broadcast station in a manner to serve the public convenience, interest, or necessity."¹¹

However, a "lack of candor" in the context of a specific proceeding is not cured by reference to the applicant's pre-existing "commendable record." Indeed, experience may serve to aggravate rather than mitigate the consequences of misconduct in the broadcasting field.¹²

The Commission may apply a variety of administrative sanctions, depending upon the current status of the moving party. Outright disqualification of a prospective or existing licensee is the ultimate penalty where the facts make it patently clear that the applicant cannot be entrusted to conduct a broadcast operation in the public interest. *American Southern Broadcasters*, _____ FCC _____, 13 RR 927 (1957); *Radio Suburbia, Inc.*, unreported FCC Reports, 13 RR 969 (1956); *Walter T. Gaines (WGAV)*, 25 FCC 1387, 16 RR 159 (1958).

b. The Commission's Disposition

Where substantial questions relating to character are unresolved by pleadings, the Commission properly employs the hearing process for final determination, considering "lack of candor" as a basic criterion for resolution of character determinations.

Here, abundant evidence of a lack of candor on the part of KTHO was presented to the Commission by KOWL in four distinct pleadings. The

¹¹ *Melody Music, Inc.*, 2 FCC 2d 958, 960, 6 RR 2d 973, 975 (1966). On remand from U.S. Court of Appeals for the District of Columbia Circuit, 120 U.S. App. D.C. 241, 345 F.2d 730 (1965).

¹² *WDUL Television Corp.*, 36 FCC 497, 2 RR 2d 131 (1964).

Commission's obligation under the Act was to order an evidentiary hearing. But in its Memorandum Opinion and Order (the "Order"), 23 FCC 2d 178, 19 RR 2d 149 (1970) (App. 1), the Commission did not even treat the character question. It will be shown herein that the character allegations were substantial. When this section of KOWL's Brief is read in light of the realization that the Commission *noted* in its Order that KOWL had asked for an evidentiary issue to determine whether representations of the applicant concerning ascertainment of community needs and interests reflected adversely upon its qualifications (App. 2, para. 3), but subsequently avoided *any* rational treatment of the subject, the need for reversal is patent.

c. Evidence of Misrepresentation

(1) The 865 Signatures

In conjunction with a "Petition for Expedited Consideration," filed May 24, 1966, in support of the initial full-time proposal, KTHO included thirty-one sheets of paper containing some 865 signatures of what it termed "members of the public in the area served by KTHO requesting full-time operation."¹³ See transmittal letter of KTHO counsel addressed to Ben F. Waple, Commission Secretary, dated May 27, 1966. Pointing to the 865 signatures as indicative of a "compelling public interest factor" and an "extraordinary number" (considering the fact that the full-time population of the area was said to be 31,600 people), KTHO completed its syllogism by assuming each signator represented a household of four and concluding some eleven per cent of the area's populace had thus demanded full-time services on behalf of KTHO.

¹³ These sheets were expressly relied upon in the prosecution of the second KTHO application accepted for filing on March 1, 1968. See "KTHO's Opposition to KOWL's Supplement to Petition to Deny," filed November 1, 1968, page 5, para. 12(b) (A. 88).

(Petition for Expedited Consideration, May 27, 1966, p. 11, paras. 23, 24.)
(App. 7, 8).¹⁴

In a June 7, 1966 letter to Ben F. Waple, Commission Secretary, KOWL stated that no copy of the pleading had been originally served upon KOWL and alleged further that a great deal of the signature material was inaccurate. The very next day, with what could of necessity have been only a cursory investigation — if that — into the charge, KTHO flatly informed the Commission there was no basis for any allegation of "inaccuracies." (Letter addressed by KTHO counsel to Ben F. Waple, Secretary of the Commission, dated June 8, 1966, page 1.) (App. 20.)

The Petition for Expedited Consideration was denied by the Commission and there the matter lay, until KTHO in its subsequent application amendments and pleadings sought to use the signatures substantively to prove up its past efforts to ascertain needs and problems. KOWL then detailed for the Commission, under oath, the precise nature of the inaccuracies. (App. 40-45; "Petition to Deny," filed April 1, 1968, Shank affidavit.) *Eighty* of the signators were school children, general age range from eleven to fourteen, who in the course of a school lunch hour were approached by two classmates and promised an expanded KTHO rock 'n roll presentation in exchange for their support. Such a proposed rock format substantially lessened the possibility that such youthful signators were simultaneously representing the tastes of their parents' household of four as KTHO had posited. Moreover, the further merit of including these eighty signatures, given the circumstances surrounding their solicitation, is indicated by one Freddie Chaconia, who asserted in response to the "Petition's" section for home address that he was simply too young to know his own. (See "Petition for Expedited Consideration," filed May 27, 1966, Appendix sheet headed "KTHO NIGHT TIME YES!!" marked 4-B; App. 13.)

¹⁴ Since 1960 the Commission has consistently insisted that its licensees "exercise conscientious efforts" to ascertain the needs of the public they will serve. *In re Report and Statement of Policy Re: Commission En Banc Inquiry*, 25 FR 7291, 20 RR 1901, 1913 (1960).

The "Petition's" defects did not stop there. *Twenty-two* of the signators were patently out-of-towners whose names could fairly not be included as members of the listening public prospectively KTHO served.

In addition, *eleven* of the signatures evidenced double signings.

Twenty-three were invalid owing to a lack of any address.

Five were disavowed by the purported signators.

Conceding that the findings of KOWL's affiant, Shank, might have been subject to some minor adjustment, KOWL deposed that some 500 signatures were obtained by just depositing the sheets on supermarket counters and walking away. Some of the sheets had no heading to indicate their purpose and to compound matters no representative of KTHO remained on hand to supervise (there is a "Batman" signature, sheet number 11; App. 15), or to answer any questions of the market's patrons relating to the broadcast proposal. The atmosphere that customarily pervades a shopping market, together with the lack of an explanatory heading on some of the sheets, served along with the above-enumerated defects to cast substantial doubt, KOWL averred, on the petition as the valid measure of public opinion KTHO claimed it to be.¹⁵ The Commission was entitled to know the methodology employed by its applicant from the applicant; here it learned only because a competitor dug up the facts. Those facts which were unearthed call for deeper inquiry, or at very least, a concise statement why the inquiry is not necessary. But the Commission ignored the entire question.

KOWL argued that a conscientious, candid applicant would have taken care to strike out or provide explanatory references for the obviously invalid signatures rather than including them, as did KTHO, as part of a much-touted

¹⁵ KTHO forcefully, but blithely, cited the Commission to these materials as support for its ascertainment of needs efforts even after the defects were called to its attention. See KTHO amendments filed April 28, 1969 and April 9, 1970, pages 1 and 3, respectively. (App: 106, 152-153).

total of 865 "strong requests for favorable action." ("Petition for Expedited Consideration," paragraph 41; App. 10.)

The thirty-one-sheet travesty marked KTHO's embarkation upon a course of conduct incompatible with the Commission's requirement that all facts relevant to the prosecution of an application be meticulously and carefully represented. It is appropriate, therefore, to bear in mind the procedural approach utilized by the Commission in a different proceeding with a character question involved:

" . . . as indicated by our ruling on exceptions, we do not fully concur in all respects with the findings and conclusions arrived at by the Examiner The crux of our most serious disagreement with the Initial Decision, however, goes to the Examiner's ultimate approach to this case. The Examiner considered the items of alleged misrepresentation on an individual basis, exonerating Davis of misrepresentation and lack of candor with respect to each of them. Isolating and evaluating each of the items in this fashion obscures and distorts the overall picture. Nowhere does the Examiner consider altogether the *collective effect* of all the inaccurate information in Davis' balance sheets and his explanations thereat, upon his conduct as a broadcast licensee." *The Walmac Co.*, 36 FCC 507, 2 RR 2d 145 (1964). (Emphasis added.)

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(2) November, 1968 Amendment — A Clear
Lack of Conscientiousness

Those signature sheets were followed, after a time, by another Amendment, filed November 1, 1968. Here, a more pronounced lack of candor and clearer evidence of outright misrepresentation were revealed. The amendment contained an additional 200 endorsement signatures, spread over eleven pages, together with some forty-two letters purporting to support KTHO's proposed expansion of service. This time, KTHO represented to the Commission that eleven pages were "public petitions for grant of fulltime authority" and that

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the forty-two "different detailed" letters were from "members of the public which support the KTHO fulltime application and which express particular needs for KTHO's service" (Amendment of November 1, 1968, page 1; App. 71).

Again, as attested to by KOWL's C. Kenneth Hildebrandt, in an affidavit appended to KOWL's "Reply," filed November 14, 1968 (App. 96), the signature sheets were left unattended in markets and stores. Again, no mention was made to the Commission by KTHO as to the unsupervised nature of the procedure. After investigation, KOWL proved up the following in its Reply:

Fully twenty-five per cent of the "different"¹⁶ letter writers doubled up by signing the request sheets; Mrs. W. E. Tooker (page 3, line 1); W. B. Murphy (page 11, line 4); Robert Hannum (page 11, line 12); John H. Reid (page 5, line 9); A. Magliari (page 3, line 3); Irvin Morris (page 3, line 8); E. H. Smith (page 1, line 2); Will Cluff, Jr. (page 3, line 5); Earl Cooper (page 1, line 1); John H. Downey (page 3, line 10); and Marden Sims (page 1, line 3).¹⁷

Signators Lane, Tooker, and Whitely were involved in an ongoing business relationship with KTHO through Lane and Associates, a local advertising agency. Yet, this fact was also not revealed by KTHO to the Commission.

Sprinkled among the "members of the public" expressing "particular needs for KTHO's service" were KTHO employees Delgado, Richard Green, Mrs. Nicotera (secretary at KTHO), Nick Nicotera (publicity for KTHO), David Wakeman (sales manager for KTHO), and Greg Palant¹⁸ (all signatures appear on page 3; App. 73). Indeed, Richard Green, while intoning that the "part time" basis of KTHO service is "grossly unfair," did so in a letter on stationery connected with an outside business interest. (App. 83.)¹⁹

¹⁶ KTHO Amendment, filed November 1, 1968, signature page (App. 71).

¹⁷ Neither signature sheets nor lines were numbered by KTHO.

¹⁸ This represents some two-thirds of KTHO's total of station employees (Application filed October 17, 1967, Section IV-A, para. 31).

¹⁹ KOWL also showed that the letter from one Robert Wakeman endorsing KTHO's full-time proposal was submitted by KTHO without mention that Mr. Wakeman's son, David, was and is KTHO's sales manager.

KOWL also brought to the Commission's attention other important facts in connection with the letters: a letter from H. Robert Hampton of the Dillingham Corporation of California denigrated the "quality of disc jockeys" and operating "standards" of KOWL, citing these factors as indicative of the need for a full-time KTHO AM operation (App. 77). KTHO withheld from the Commission the fact that Hampton was engaged by KTHO to appear regularly on the air for KTHO radio on mobile unit broadcasts. In addition, Mr. Hampton's name and address appeared on line 1 of the final page of newly-added signators in an ostensibly *different* signature from the one in the letter.

All these facts, brought to the Commission's attention in the KOWL "Reply," were supported by affidavit.

KTHO chose not to respond in any way — at that time or in any of its subsequent amendments or pleadings — to the allegations that it had thus attempted *sub silentio* to present a false and misleading portrait of its community support.²⁰ For its part, the Commission likewise refused, or failed, to comment or make any findings.

(3) Community leaders — Misrepresentations Again

On April 28, 1969 and in response to an April 14, 1969 letter from the Commission's Broadcast Bureau, KTHO filed yet another amendment purportedly to cure the patent defects the Broadcast Bureau noted in its survey of community needs and problems. The amendment contained KTHO's appraisal of needs and problems as seen through the eyes of community leaders contacted by KTHO's representatives. KOWL, once again, directed the Commission's

²⁰ In fairness it should be stated that the facts concerning these misrepresentations were presented to the Commission by KOWL in a reply pleading to which KTHO had no immediate *right* to respond. The Reply dealt with this matter because KTHO filed the November 1, 1968 amendment in resistance to KOWL's Supplement to Petition to Deny. The Reply was, as a procedural matter of right, KOWL's next entitled pleading; it was lodged fourteen days after the amendment. Had it so desired, KTHO *could* have sought leave to respond, or amended as a matter of right to delete the challenged representations.

attention to the manifold discrepancies in KTHO's description of the nature, frequency and relevance of these contacts to the issue at hand. The record shows the unresolved conflicts of sworn fact:

1) a) *Walt Little*, Director of Recreation for South Lake Tahoe, was "contacted" in conjunction with "the severe problems of providing adequate nighttime recreation facilities for youth," according to KTHO.

b) *John Williams*, City Manager of South Lake Tahoe, was also contacted in this context. (Amendment filed April 28, 1969, pp. 9-10; App. 114-115.)

2) KTHO claimed that School Superintendent *Anthony Magliari* had been in touch with KTHO representatives concerning the temporary closing of the Meyers Elementary School. KTHO asserted "public criticism" was generated in the community by the closing which concerned Magliari as principal. (*Id.* p. 11; App. 116.)

3) KTHO asserted its representatives had been "in continual contact" with Mr. *John Gianotti* and *Joseph Geach*, respectively, who represent the Highway 50 Federation, as well as City Manager John Williams, concerning the great problem for the region caused by the inadequacy of U.S. Highway 50. (*Id.* pp. 12-13; App. 117-118.)

THE FACTS

1) a) Mr. *Little* in an affidavit sworn to May 8, 1969, denied that the alleged discussion with KTHO ever took place. (App. 126, 144);

b) Mr. *Williams* in an affidavit of May 5, 1969, swore the meeting with KTHO officials concerning "severe problems of providing adequate nighttime recreation facilities for youth" never took place. In a subsequent affidavit, sworn to June 6, 1969 (App. 145), Mr. Williams recalled that a single discussion with KTHO concerning the "operation and conduct of a teen-age dance center" had taken place in February or March.

2) Superintendent *Magliari* in affidavits of May 7 and 9, 1969, swore no substantial "public criticism" over the school closing ensued; that the closing was *welcomed* by the community as a temporary response to the depressed economics of the community; and that at no time did he feel compelled to meet with KTHO on the subject. (App. 127, 131.)

3) Both Mr. *Gianotti* and Mr. *Geach* in affidavits of May 5, 1969 stated unequivocally that they were at no time in "continual" or any other direct contact with KTHO regarding Highway 50. (App. 128, 129.)

There the matter stood. KTHO submitted some additional materials, taken into account above, and also a sworn narrative from its Vice President-General Manager, Hankoff.²¹ There, KTHO referred to a recent conversation with Superintendent Magliari, but was careful not to counter Magliari's repudiation of the KTHO contact. As to Mr. Gianotti, KTHO's Hankoff reported the gentleman was and would be out of town until sometime in June, 1969, but that Mr. Hankoff *suspected* that Gianotti had been confused by the signature on the "continual contact" statement. Mr. Hankoff felt able to state that he and Gianotti were both present at a Chamber of Commerce meeting where Highway 50 was discussed (by someone), and that Gianotti had once reported to the South Lake Tahoe Chamber of Commerce Board on a California State Highway Commission meeting held in Sacramento on March 20, 1968. Regarding Geach, Mr. Hankoff was able to recall they were both present at two 1967 Chamber of Commerce Board of Director meetings (App. 139-140). That was all. For all this record shows, KTHO never went back to obtain ameliorating statements from Gianotti or Geach or to determine whether Mr. Hankoff's suppositions were accurate.

Gross overstatement and outright misrepresentation certainly are not an accepted methods of fact disclosure to a federal agency. Yet, here, passive

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²¹ App. 139.

participation in distant meetings unrelated to current community interaction between a branch of the media and the public is passed off as a meaningful and assiduous attempt by KTHO to comply with Commission requirements. Chance contacts are so distorted in the recounting as to depart from any minimum standard of precision.

In the instant proceeding, the matters raised in conflicting affidavits are so at odds with one another as to require an evidentiary hearing into the true facts. Where the Commission is presented with affidavits whose contents are diametrically opposed to one another the need to resolve the matter on record through an evidentiary hearing is obvious. *Five Cities Broadcasting Co., Inc.*, _____ FCC _____, 24 RR 743, 745 (Rev. Bd., 1962). The Commission has been consistent, in other cases, in resolving the facts in hearing when counter-ing affidavits remain uncontroverted. *Northwestern Communications Corporation*, Docket No. 18669, FCC 70-567 (June 2, 1970). See *Television Broadcasters, Inc.*, unreported in FCC Reports, 5 RR 2d 155, 159 (1965) where conflicting affidavits concerning interviews resulted in a hearing issue. Yet, here, the Commission ignored the substance of the KOWL-solicited affidavits, failed to treat the question and, accordingly, order a hearing. The Commission's Memorandum Opinion and Order, here appealed from, never directly confronted the character issue. The language used by the Commission when it did approach this aspect of the character requirement (the April 28, 1968 amendment and ensuing exchanges of conflicting affidavits) reveals an incredibly lackadaisical attitude for a fact finder:

"The applicant stated that this report was prepared and submitted after a review of its 'continuing local contacts with community leaders.' KOWL, in response to this amendment, submitted a number of affidavits from some of the individuals applicant claims to have contacted in which they deny discussing the problems of the community with the applicant or ever having been consulted by the applicant as regards specific community needs. The applicant, on the other hand, responded by submitting affidavits from

many of these same individuals in which discussions with station representatives concerning various community activities and/or problems of the community were recalled. In some instances, it appears that *certain individuals* were not contacted directly, but were present at various organization meetings, together with station representatives, at which various aspects of specific community problems were discussed." (Order, para. 11, emphasis supplied; App. 5.)

That is the only language in the entire Order which remotely touches on the character qualifications question, and even here the question is left unresolved.

Circuit Judge Wilkey's observations in a recent case stemming from a sister agency's inarticulation of a decisional rationale are remarkably appropriate here:

"In this particular proceeding, the parties adversely affected by the Commission's decision, and seeking to attack it, have been forced to base their attack on the failure of the Commission to consider certain important factors and the failure to specify the rationale back of the Commission's decision. Surely, the parties involved are entitled to a more explicit exposition of the rationale behind the Commission's decision . . . the Commission cannot take refuge in its alleged expertise in this field when it does not set forth convincing reasons for its determination in sufficient detail to allow the validity of those reasons to be critically examined by the parties adversely affected and to allow this Court to pass on the reasonableness of the Commission's decisions."²²

Certainly, this Court's review function cannot properly be frustrated by the expedient of this Commission's failure to make findings — a failure which is at once an abdication of the Commission's statutory responsibility. Thus, the Commission committed reversible error on two counts: (1) by its failure

²² *Public Service Commission of the State of New York v. Federal Power Commission*, No. 21,446, decided June 29, 1970, Slip Op. at 6 (1970). *Accord, Community Service, Inc. v. U. S.*, 418 F.2d 709, 717 (6th Cir., 1969).

to order the necessary evidentiary hearing to resolve substantial and material questions of fact bearing upon KTHO's character, and (2) by its failure to specify with required clarity the rationale underlying its decision as set forth.

2. Substantial Questions of Fact Were Raised With Respect to KTHO's Ascertainment of Community Needs and Interests

a. The Commission's Disposition

With respect to KTHO's required ascertainment of community needs, the Commission, again, vaguely designated "some" of KTHO's efforts as "patently defective" and still "others" as of "questionable merit" (Order, para. 14; App. 5). There the Commission stopped, except to note its satisfaction with KTHO's final ascertainment amendment of April 9, 1970.

b. The Commission's Ascertainment Standard

The hallmark of an acceptable ascertainment of needs survey has been an assiduous quest for, and development of, proposed programming responsive to community needs as articulated by a representative cross-section of community leaders and the listening public in general. Applicant perception of the subjective listening preferences of the broadcast audience has been deemed largely irrelevant by the Commission. It is the applicant's affirmative duty to formulate his proposed programming format with the community's *needs and problems* foremost in his mind. The individual *tastes* of the listening public assume a secondary role. *Report and Statement of Policy Re: Commission En Banc Programming Inquiry, supra*, at 12; *Public Notice Relating to Ascertainment of Community Needs by Broadcast Applicants*, 33 FR 12113, 13 RR 2d 1903 (1968).²³

²³ The two-page public Notice, released August 22, 1968, merely sought to further provide applicants with a "better understanding" of the Commission's ascertainment requirement as previously set forth, and may fairly be applied to KTHO's post-August, 1968 amendments.

The applicant is afforded a wide range of discretionary power in the area of programming, provided that, in keeping with advancement of the public interest, a rational nexus between the results of his ascertainment efforts and his programming proposal is demonstrably indicated. Further, the applicant is expected to make a positive, diligent and continuing effort to provide a responsive programming format. Information gleaned from consultation with community leaders must, in turn, be reported to the Commission in Section IV of the applicable broadcast application form. *Report and Order Re: Amendment of Section IV (Statement of Program Service) of Broadcast Application Forms 30A, 303, 314, and 315*, 1 FCC 2d 439, 5 RR 2d 1773 (1965).

The Commission provided its applicants with an additional clear, positive statement of its basic ascertainment policy in *Minshall Broadcasting Co., Inc.*, 11 FCC 2d 796, 12 RR 2d 502 (1968). The *Minshall* doctrine contains four basic, correlated elements which must be complied with:

- "(1) The steps they [applicants] have taken to inform themselves of the real needs and interests of the area;
- (2) The suggestions they have received;
- (3) Their evaluation of those suggestions;²⁴
- (4) The programming proposed to meet the community needs as they have been evaluated."

The Commission, in subsequent decisions, refined and added to the kind of survey approach that would be expected to yield the desired programming result. However, the *Minshall* framework has been studiously preserved.

Failure to comply with one or more of the *Minshall* components has since resulted in numerous cases where a hearing has been ordered or an issue added

²⁴ An explicit evaluation was originally required of applicants. However, the evaluation now may be implicit, provided that, such an evaluation is reflected in the proposed programming format. *Sioux Empire Broadcasting Co.*, 16 FCC 2d 995, 15 RR 2d 961, 966, fn. 4 (1969).

where a hearing had already been ordered.²⁵

c. KTHO's Ascertainment Efforts

1. Pre-April, 1970 Showings

Examination of KTHO's pre-April, 1970 amendments indicates a marked disregard for the Commission's ascertainment standards. The original ascertainment efforts, tendered in conjunction with KTHO's application of October 17, 1967 for expanded hours of operation, consisted of a mere listing of 89 organizations which KTHO had contacted. No showing was made, however, of needs ascertained from specific, identifiable spokesmen for those groups. That KTHO's initial findings were formulated prior to the Commission's issuance of the *Minshall* doctrine and the *Public Notice*, *supra* at 22, does nothing to mitigate its patent insufficiency. In *Sioux Empire Broadcasting Co.*, *supra* at 23, the Commission held:

"However, it is clear that *Minshall* was only a restatement of fundamental policy designed to clarify our general views on this matter [of ascertainment]. In *Minshall*, we simply stated that the emphasis would be placed upon the relationship between ascertainment of community needs and their implementation in the programming schedule so that we can determine if the applicant is aware and responsive to those needs."

Thus, the Commission ignored its own precedent here when it charitably insisted that KTHO's pre-*Minshall* ascertainment effort, alluded to above, was to be regarded less severely as a result. (Order, para. 9; App. 4.)

²⁵ *Brinsfield Broadcasting Company*, 19 FCC 2d 769, 17 RR 2d 325 (Rev. Bd., 1969); *Easter California Broadcasting Corp.*, unreported in FCC Reports, 13 RR 2d 261, 265 (1968); *Faulkner Radio Inc.*, 15 FCC 2d 780, 15 RR 2d 285, 289-90 (1968); *Heart of Georgia Broadcasting Co., Inc.*, 19 FCC 2d 20, 16 RR 2d 1134, 1145 (1969); *KBLI, Inc. (KTLE)*, 15 FCC 2d 709 (1968); *Summit Broadcasting*, 16 FCC 2d 909, 15 RR 2d 995 (1969); *Sundial Broadcasting Co., Inc.*, 15 FCC 2d 58 (1968); *Virginia Broadcasters*, 15 FCC 2d 1004, 15 RR 2d 487 (Rev. Bd., 1969); *William D. Stone (WRDS)*, 15 FCC 2d 53, 14 RR 2d 623 (1968); 15 FCC 2d 808, 15 RR 2d 135, 137 (Rev. Bd., 1968).

KTHO proceeded to amend this initial showing with yet another unresponsive effort tendered November 1, 1968. A collection of letters from community leaders solely testimonial in content was displayed to the Commission as appropriate proof of KTHO's ability and willingness to further the public interest. Very few suggestions or comments, or observations on community needs or problems, were related to the Commission. The exhibits mainly elaborated upon the community's favorable acceptance of the applicant's proposed extension of operating hours. In this sense, the showing is much akin to the survey rejected in *Port Jervis Broadcasting Co., Inc.*, 16 FCC 2d 601, 15 RR 2d 706, 709 (Rev. Bd., 1969). There the survey merely yielded expressions of hope that a new FM station would be provided.²⁶ Then, too, the amendment's petitions of support from the general public were solely bare endorsements for a fulltime KTHO — bereft of any suggestions as to community needs and problems. Indeed, the above-mentioned ascertainment efforts at that point were so inadequate as to prompt the Commission's Broadcast Bureau, in answer to a KTHO request for expedited action, to rule any such action was beyond consideration since the application continued to remain unresponsive on the ascertainment count. (Letter of April 14, 1969 addressed to KTHO; App. 105.)

KTHO's second amended ascertainment effort was presented to the Commission on April 28, 1969, well after the *Minshall* decision was released. Like its predecessor, it suffered the same substantive defects and the taint of misrepresentation.²⁷

2. The April 9, 1970 Showing

KTHO's amendment of April 9, 1970 approached surface compliance with the Commission's ascertainment requirement. However, even KTHO admitted

²⁶ The related defects inherent in the KTHO solicited letters have previously been discussed in the character section of this Brief, *supra*.

²⁷ The contents of this amendment have also been extensively discussed in the character section of this Brief, *supra*.

that much of the amendment's contents was repetitive.²⁸ Analysis showed the amendment suffered from clear defects by a *Minshall* standard of judgment. This failure to comply with the *Minshall* doctrine was the most telling indictment of KTHO's ascertainment effort. While KTHO concededly sought a representative cross-section of community leaders in its April 9th amendment, nowhere did it specify programs to meet the new needs and problems. The point is worthy of elaboration. Not once in the course of the proceedings did KTHO amend and expand its proposed programming schedule to reflect the multiple needs and problems of the community that began to manifest themselves as KTHO engaged in more responsive ascertainment efforts. Those community leaders KTHO finally reached articulated a wide range of community needs and problems — many more such than KTHO was able to report to the Commission prior to April, 1970. It is axiomatic in the context of this Application that if it really intended to program to respond to those needs and problems, KTHO's austere programming proposal would, of necessity, have had to be updated and changed. Instead, KTHO's total ascertainment effort evidenced a carefully orchestrated approach on its part to fortify a preconceived result — that the complex needs and problems of its community could largely be served by pop music — 75 percent of its proposed programming. (App. 26.)

In Exhibit 2 to its Application KTHO stated "as a direct result of continuing consultation" with segments of the public that, apart from a desire for "popular music" and "basic national and international news" the "most significant needs and interests" of the public were only four in number (App. 30):

- A. Weather, road and ski conditions;
- B. Articulation of the many problems resulting from the establishment of a new, incorporated city;
- C. News of the major business of the area — tourism;

²⁸ App. 165.

D. General local news and information.

In Exhibit 3 to the Application, KTHO set forth four proposed programs to meet the above-noted needs and interests of the listening public (App. 31):

- A. Weather reporting and informational services on ski conditions;²⁹
- B. "Ask Your City Manager" (with neither frequency nor duration specified by KTHO);²⁹
- C. "Celebrity Time with Ellie Hillyard" (to appear three times a week);²⁹

Local news and information.²⁹

KTHO proposed, in the application, to operate 162 hours per week with twenty-one per cent of that time devoted to news, public affairs and other programs, exclusive of entertainment and sports, as follows (App. 26):

	<u>Hours</u>	<u>Minutes</u>	<u>% of Total Time on Air</u>
News	22	13	13.7
Public Affairs	2	23	1.5
Other	9	28	5.8
			<u>21.0%</u>

Reading down the list of needs and interests finally ascertained by KTHO and submitted to the Commission in April, 1970, one finds many of the same problems that concern American communities today: drug abuse, high crime rates, ecology and a decay in municipal services are mentioned repeatedly. Alongside these broad problem areas were added problems that are singularly rooted in South Lake Tahoe. For example, Dr. Fred Adams, Principal of

²⁹ Before it filed this application for fulltime facilities KTHO had each of these four programs on the air (App. 31; all four were to be given "expanded exposure").

South Lake Tahoe's High School, complained of a lack of "community identity" brought about and perpetuated by "geographic secularisms." (App. 157.) An outmoded tax base which foists the costs of municipal upkeep exclusively on the year-round resident was pointed to by Lt. John T. Crow, a Police Department detective (App. 154). The lack of a State College in the immediate environs of the area concerned Mr. Martin Smiley, Fire Chief (App. 156). In response to these and a multitude of other felt community needs,³⁰ KTHO referred to the treatment of such needs and problems in the apparently since-cancelled program "Ask Your City Manager" and via increased local newscasts (App. 155-156). The in-depth coverage that these problems would seemingly require is sloughed off onto KTHO's unnamed, non-regularly scheduled "special programs" and public service spot announcements.

Nor did the Commission make any findings on KOWL's repeated charges that KTHO had not revealed what it was already doing, by way of its full-time FM broadcast station, to serve the needs and problems. No attempt was made to weigh the need for an additional nighttime AM service in the context of unserved needs.³¹ In the absence of any portrayal of the Commission's reasoning, one is tempted to speculate that the Commission concluded that a normal week would contain treatment of the needs and problems in the expanded news coverage and the specials, along with the public service spots. But this cannot be so because the proposed hours, minutes and percentages

³⁰ "Deficient highways," Lt. B. B. Ball, officer in charge, CHP Lake Valley substation (App. 156); "Lack of employment opportunities," Mr. John R. Pettyjohn, realtor (App. 156); "No adequate teenage entertainment," Mary Noble, housewife (App. 161).

³¹ The Commission's failure to bring a reasoned analysis to this application is all the more perplexing in view of its recent policy conclusion that fulltime FM stations should no longer be permitted to acquire a fulltime AM station, *First Report and Order*, Docket No. 18110, Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, 22 FCC 2d 306, 18 RR 2d 1735, 1739 (1970). Although the instant fulltime application was "grandfathered," the policy determination indicates the need for more than the causal treatment shown here.

of news, public affairs and other programming have not increased from the normal weekly levels established in the October 17, 1967 Application (App. 26).

The Commission simply overlooked or ignored the glaring lack of any revised upgrading in the programming format which would indicate KTHO was sincerely interested in advancing the public interest rather than its own private concerns. The defect does not become invisible merely because the Commission declined to discuss it; the Commission's role of fact finder and public interest arbiter demanded more than silence. It was reversible error for the Commission to tacitly waive its ascertainment standard and conclude KTHO's efforts were acceptable.

3. Commission Ignored Resolution of Substantial Facts Raised That Indicated KTHO's Financial Showing Was Incomplete And Out of Date

Before the Commission, KOWL did not question KTHO's financial capacity to put the nighttime facilities into operation; it did, however, seriously question the estimates of revenues and expenses. As this Court stated in *West Michigan Telecasters, Inc. v. F.C.C.*, 130 U.S. App. D.C., 39, 396 F.2d 688 (1968), "the basis and reasonableness of the estimates of costs and expenses are material considerations" in judging an applicant's financial qualifications. Obviously, until those estimates are found to have a basis in fact and be reasonable, the required judgment cannot be made that the applicant has sufficient financial capacity to put the facilities into operation and then keep it operating for at least a year. This is the Commission's so-called *Ultravision* test (*Ultravision Broadcasting Co.*, 1 FCC 2d 544, 5 RR 2d 343 (1965)), whereunder an applicant must show availability of sufficient funds to put the facilities into operation and operate for one year assuming no revenues from the new facilities, unless an applicant actually proves up expected revenues.

Here, of course, KTHO has an existing daytime operation, the experienced revenues from which it *could have* elected to qualify as financial support for the proposal. It chose not to do so, however, stating:

"The applicant has operated at a loss during the last two years. The applicant does not rely on corporate income for this application. As is shown in Exhibit No. 8 the two owners of the applicant will provide funds for the fulltime construction and operation and their income[s] [were shown as each being 'in excess of \$30,000.-00 after Federal Taxes for each of the years 1965 and 1966'.]" (App. 32).

This election enabled KTHO to avoid detailing the losses, or the revenues and expenses, which resulted in the deficit operation.

Even though KTHO elected not to amend to prove up expected income, the Commission adopted subsequent KTHO pleading statements and found that "since June of 1967, 'revenues have kept pace with expenses so that KTHO has been self sufficient' and, that for the one-year period ending March 31, 1968, KTHO had gross revenues of approximately \$100,000." (App. 3).³² The Commission was able to agree because, it said, "financial statements" of KTHO for the years 1967-1969 supported them (App. 3). But the Commission neglected to find whether the estimated expenses were or were not reasonable. Moreover, the Commission did not determine the incremental expenses which the proposed 24-hour nighttime operation would add to the existing 12-hour daytime operation. Indeed, it could not because the record fails to show what those added expenses amount to. Thus both the "basis" and "reasonableness" criteria — the material considerations this Court found necessary in judging financial qualifications in *West Michigan Telecasters, supra* — are missing. To KOWL's insistence that the \$90,000 estimated expenses be supported, the Commission (and KTHO) said nothing, other than

³² The Commission omitted the immediately succeeding KTHO qualification which indicated that extraordinary capital costs and expenses of a then recent site move were not included. Opposition to Petition to Deny and Further Request for Expedited Action, filed April 15, 1968, p. 13 (App. 13).

revenues kept pace with the unknown expenses from June of 1967 to April, 1968.³³

The Commission's attempt to cover this decisional gap by blind reference to the "financial statements" filed by KTHO for the years 1967-1969 which, it maintains, "support these figures and show that the station's revenue and expense estimates are realistic and reflective of the applicant's actual and current operations in the market" (Order, para. 7; App. 3), should be unavailing. The short answer is that KTHO *has no experience* operating a fulltime standard broadcast station. Beyond this, although the Commission does not say so in its Memorandum Opinion and Order, the "financial statements" it referred to in order to make that finding are not open to inspection by the public. KOWL was not permitted to see them. KOWL's June 10, 1970, request for access to them was opposed by KTHO and was denied. (See letter dated July 10, 1970 addressed to KOWL counsel by Max D. Paglin, the Commission's Executive Director, enclosing a "Ruling on Request for Inspection of Records" (App. 188, 189). Here, again, as in *West Michigan Telecasters, supra*, the Commission is, impermissibly, just assuming the expenses are reasonable—here, though, in the absence of even an allegation of what the incremental expenses will be.³⁴

Nor should the Commission, by its allusion to the financial capacity of KTHO's Mr. Breckner (Order, para. 8; App. 3), be permitted to gloss over the consequences of its failure to come to grips with the facts. Financial capacity cannot properly be viewed in the vacuum the Commission has created.³⁵ Mr.

³³ It is Commission policy generally that estimates be supported when challenged. Indeed, from and after April, 1969, it is mandatory that all applicants such as KTHO initially state "the basis of" the financial estimates including "complete itemization of cost of operation for the first year. . . ." FCC Application Form 301, Section III, paragraph 1.b., Form Approved Budget Bur. No. 52-RO 14.19.

³⁴ Under oath, KOWL reported to the Commission that *its* nighttime business in the market (7:00 p.m. — 6:00 a.m.) did not cover even the salaries paid to the nighttime employees (Reply, filed November 14, 1968, page 8; Order, para. 4; App. 95).

³⁵ Certainly, the availability to an applicant of a given sum is meaningless until the estimated expenses are found. Here, there is also reason to question whether the two-year-old Breckner financial statement remains substantially accurate.

Breckner presented a June 30, 1968, balance sheet which showed current assets of \$285,000 and current liabilities of \$10,000 (App. 68). Listed stocks were there shown as being in excess of \$280,000 (98 per cent of total current assets), and were not classified as among corporations. But KTHO has not filed to reflect the effects on those stocks of the steep 1969-70 stock market decline. Moreover, in light of the fact the Commission realizes that Mr. Breckner is committed to put up sufficient stocks to guarantee a \$53,000 loan to Mr. McBain (none of the proceeds of which would be available for KTHO), and that Mr. Breckner has a commitment to Crown City Broadcasting Co., one of ten applicants for KRLA, Pasadena, California, in an amount allegedly something less than \$53,000 (App. 3-4), it is an abrupt shift from normal procedures for the Commission here to accept the (Mr. Breckner's) two-year-old financial statement without demanding a current one.³⁶ Especially is this so when Mr. Breckner has evidently borne, in the interim, the "heavy hearing" expenses in connection with the Crown City application. These factors signal the existence of a need for more current information. But the Commission appears totally insensitive to this need.

Only a week's space separates this treatment with that accorded the applicant in Bentonville, Arkansas, where the Commission summarily dealt with a stale financial showing in these words:

"6. Examination of [applicant's] financial showing indicates that it is not current and for that reason it will

³⁶ Beyond this, it was most arbitrary, the premises considered, for the Commission to gauge the Breckner (and McBain) commitments to Crown City on the basis of a November, 1965 statement. The Commission is fully aware that the ten-applicant KRLA, Pasadena, California, proceeding is one of the, if not *the*, most complex and expensive pieces of litigation to come before the Commission. The presiding examiner in the Pasadena proceeding referred to it as "grossly complex." *Charles W. Jobbins, et al.*, Docket No. 15752, Initial Decision, FCC 69D-19, released April 2, 1969, footnote 5n, page 10. ___ FCC 2d ___. The proceeding is awaiting action by the Commission's Review Board on exceptions to the Initial Decision. Messrs. Breckner and McBain each have fourteen per cent interests in Crown City's application (*Id.* at para. 68). KTHO itself has referred to that proceeding as one involving "heavy hearing expenses" for Crown City (App. 53). But the effects of satisfaction of those heavy expenses on the financial statements in this application have not been shown.

be necessary for the applicant to establish its financial qualifications in hearing." *Northwestern Communications Corporation*, FCC Docket No. 18869, Memorandum Opinion and Order, FCC 70-567, adopted May 27, 1970, released June 2, 1970.

To like effect is the Commission's Review Board action in *Jackson Missouri Broadcasting Co.*, unreported FCC Reports, 14 RR 2d 445 (Rev. Bd., 1968).

In sum, the Commission has once more simply declined to discuss or treat essential facts. It has, accordingly, set forth no reason to distinguish the *Northwestern Communications case (supra)* from the favored treatment accorded KTHO here. The need for decisional clarity reiterated by this same appellate tribunal has again been ignored by the Commission.³⁷ Neither KOWL nor the Commission, nor this Court, can say that the question is insubstantial. The Commission's statutory obligation to find financial qualifications of applicants cannot be discharged by the omitted findings and loose assumptions indulged in here. Again, the Commission committed reversible error.

4. **KOWL Raised Substantial Factual Questions Entitling It to a Hearing Which Could Not Be Denied by Expedient of Commission's Refusal to Treat the Questions**

KOWL's Petition to Deny, pursuant to Commission Rule 1.580(i), 47 C.F.R. § 1.580, and its other pleadings responsive to the KTHO application and amendments, raised questions which the Commission, in other cases, consistently has considered substantial. Thus, for example, the trustworthiness of an applicant's representations is the single most critical element in the determination that an applicant will translate its promises into performance. *Carbon Emery Broadcasting Company*, 22 FCC 587, 12 RR 1268 (1957). *Melody Music, Inc.*, 2 FCC2d 958, 6 RR 2d 973 (1966), on remand from U.S. Court of Appeals for District of Columbia Circuit, 120 U.S. App. D.C. 241, 345 F.2d

³⁷ *H & B Communications Corp. v. F.C.C.*, ___ U.S. App. D.C. ___, 420 F.2d 638, 644 (1969).

730. And an applicant's efforts to ascertain the needs and problems of the area it is to serve and its translation of those needs and problems into responsive programming is deemed the *sine qua non* of broadcasting. *In Re Report and Statement of Policy Re: Commission En Banc Programming Inquiry*, 20 RR 1901 (1960), *Minshall Broadcasting Co.*, 11 FCC2d 796, 12 RR2d 502 (1968), *Public Notice Relating to Ascertainment of Community Needs*, 33 FR 12113, 13 RR2d 1903 (1968). When misrepresentations are involved, going to the heart of both questions, they can hardly be termed "insubstantial." *F.C.C. v. WOKO, Inc.*, 329 U.S. 223 (1946). Nor can the Commission's avoidance of those sworn averments be properly judged as anything other than disobedience of this Court's teachings in *West Michigan Telecasters, Inc. v. F.C.C.*, 130 U.S. App. D.C., 39, 396 F.2d 688 (1968), and *H & B Communications Corp. v. F.C.C.*, ___ U.S. App. D.C. ___, 420 F.2d 638, 644 (1969). The review function cannot fairly be thwarted by evasion of fact finding. Speculation as to what the Commission intended is no proxy for specific statement of bases for conclusions.

As it is, substantial and material questions of fact were raised and do remain.³⁸ KOWL is entitled to hearing as a matter of right. *Folkways Broadcasting Co. v. F.C.C.*, 126 U.S. App. D.C. 123, 375 F.2d 299, 301, n. 3 (1967).

³⁸ Indeed, to certain of KOWL's sworn averments viz., those concerning KTHO's deceit in palming off its employees on the Commission, neither KTHO nor the Commission attempted answer (*supra*, at 23).

CONCLUSION

For the foregoing reasons, the Commission's Memorandum Opinion and Order, released June 1, 1970, must be reversed and this case remanded to the Commission with instructions that a hearing be held on the KOWL allegations made in the Petition to Deny and related pleadings.

Respectfully submitted,

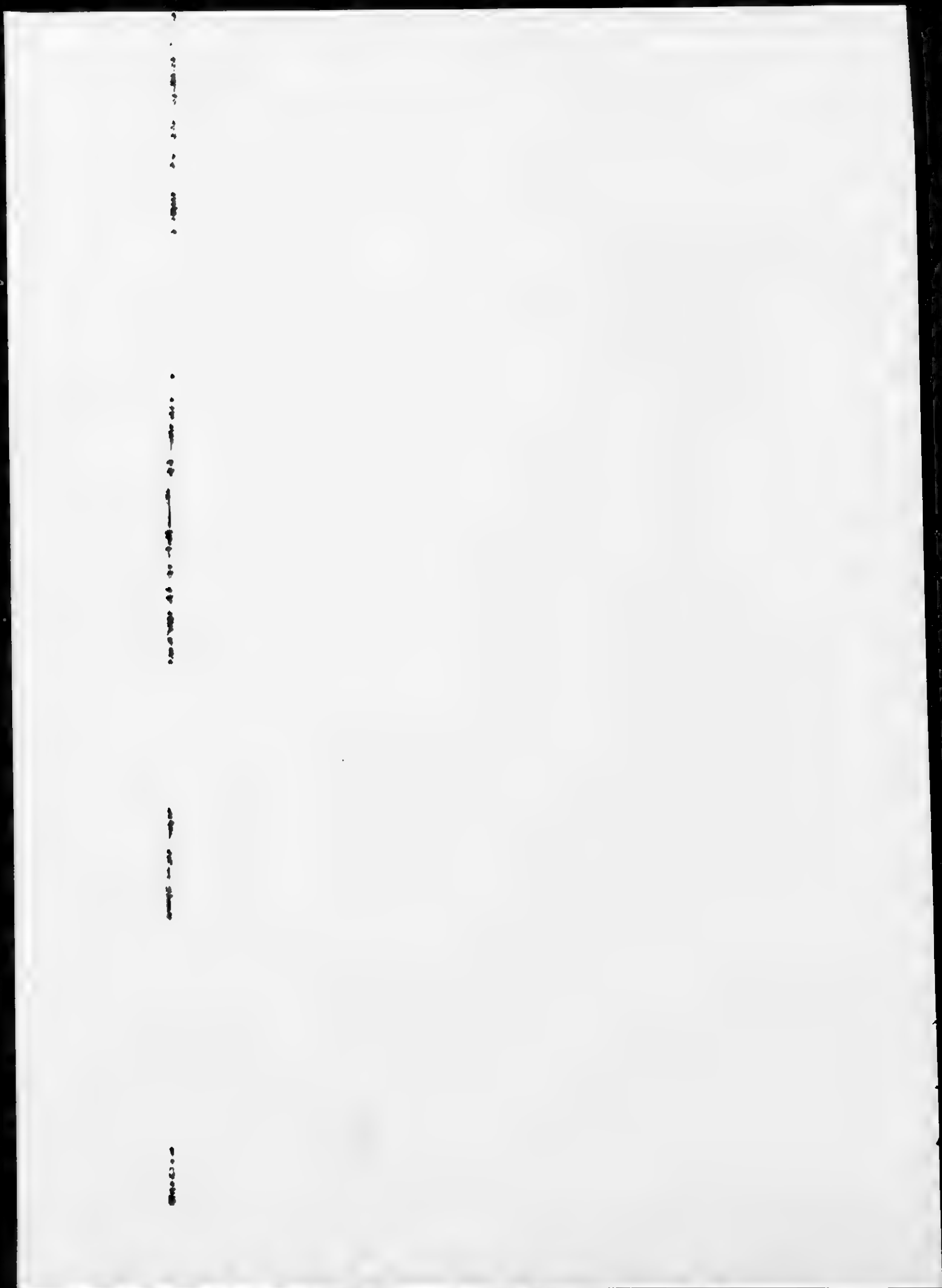
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September 2, 1970



APPENDIX

COMMUNICATIONS ACT OF 1934, AS AMENDED:

Section 308, 48 Stat. 1084, as
amended, 47 U.S.C. § 308:

* * *

“(b) All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee.

* * *

Section 309, 48 Stat. 1085, as
amended, 47 U.S.C. § 309:

Application for License

“(a) Considerations in granting application.

“Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which Section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such

other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

“(b) Time of granting application.

“Except as provided in subsection (c) of this section, no such application—

“(1) for an instrument of authorization in the case of a station in the broadcasting or common carrier services, or . . .

* * *

shall be granted by the Commission earlier than thirty days following issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof.

* * *

“(d) Petition to deny application; time; contents; reply; findings.

“(1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be *prima facie* inconsistent with subsection (a) of this section. Such allegations of fact shall, except for those of which official notice

may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

"(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a) of this section, it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a) of this section, it shall proceed as provided in subsection (e) of this section.

"(e) Hearings; intervention; evidence; burden of proof

"If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest

shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission."

* * *

Section 402, 48 Stat. 1093, as
amended, 47 U.S.C. § 402:

Judicial Review of Commission's
Order and Decisions

* * *

(b) Right to Appeal.

"Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

"(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

"(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

"(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument or authorization, or any rights thereunder, whose application is denied by the Commission.

"(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

"(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

"(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1)–(4) of this subsection.

"(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

"(8) By any radio operator whose license has been suspended by the Commission."

* * *

RULES AND REGULATIONS
THE FEDERAL COMMUNICATIONS COMMISSION

47 C.F.R. § 1.522

Amendment of Applications

"(a) Subject to the provisions of §§ 1.525 and 1.580, any application may be amended as a matter of right prior to the adoption date of an order designating such application for hearing, merely by filing the appropriate number of copies of the amendments in question duly executed in accordance with § 1.513. If a petition to deny (or to designate for hearing) has been filed, the amendment shall be served on the petitioner. See § 1.571(j) for the effect of certain amendments to standard broadcast applications.

* * *

47 C.F.R. § 1.580

Local notice of the filing of broadcast applications, and timely filing of petitions to deny them

"(i) Any party in interest may file with the Commission a petition to deny any such application (whether as originally filed or amended) no later than 30 days after issuance of a public notice of the acceptance for filing of any such application or amendment thereto: *Provided, however,* That in the case of applications for standard broadcast facilities, petitions to deny may be filed at any time prior to the day of

Commission grant thereof without hearing or the day of formal designation thereof for hearing; but where the Commission issues a public notice pursuant to the provisions of § 1.571(c) listing standard broadcast applications as available and ready for processing, no petitions to deny any such listed application will be accepted after the "cut off" date specified in the public notice: *And provided further*, That in the case of applications for renewal of license, petitions to deny may be filed at any time up to the last day for filing mutually exclusive applications under § 1.516(e). Petitions to deny shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity. Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof.

"(j) The applicant may file an opposition to any petition to deny, and the petitioner a reply to such opposition (see § 1.45) in which allegations of fact or denials thereof shall be supported by affidavit of a person or persons with personal knowledge thereof."

* * *



BRIEF FOR INTERVENOR

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,379

KOWL, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

EMERALD BROADCASTING COMPANY,

Intervenor.

On Appeal From a Memorandum Opinion and Order
of The Federal Communications Commission

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 26 1970

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October 26, 1970

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 24, 379

KOWL, INC.,

Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

EMERALD BROADCASTING COMPANY,

Intervenor.

On Appeal from a Memorandum Opinion and Order
of the Federal Communications Commission

BRIEF FOR INTERVENOR, EMERALD BROADCASTING CO.

Statement of Issue Presented

Whether the Federal Communications Commission's decision to grant the application of Emerald Broadcasting Company (KTHO) for a construction permit to change hours of operation from daytime to unlimited was arbitrary, capricious or unreasonable.

Statement of the Case

This is an appeal from a decision of the Federal Communications Commission to grant the application of KTHO for a construction permit to change hours of operation from daytime to unlimited. Memorandum Opinion and Order in re Application of Emerald Broadcasting Company (KTHO), 23 FCC 2d 178, 19 RR 2d 149.

The Proceedings Below

Five years ago, on October 22, 1965, Station KTHO filed an application for a modification of its construction permit to increase its present hours of operation on 590 kc from daytime to unlimited and also to operate nondirectionally during the daytime. More than four months later, in March of 1966, its competitor in South Lake Tahoe, KOWL, filed a "Petition to Deny Acceptance for Filing and Return Application." KOWL pointed out that the Commission had designated for hearing the mutually exclusive applications of seven applicants who proposed to use 780 kc and 720 kc in Nevada or Idaho. KOWL asserted that each of the seven applicants in that proceeding must be treated as existing stations for purpose of determining compliance with Section 73.24(b)(3) of the Commission's Rules. This section provides that all applications for new nighttime

facilities must provide at least 25 percent white area coverage within their proposed interference-free nighttime service area. KOWL alleged that one of the seven competing applications, that of Circle L, Inc. (Station KCRL) for construction of a standard station at Reno, Nevada on 780 kc, would serve KTHO's proposed white area, thereby rendering KTHO's application unacceptable for filing.

KTHO pointed out that there was no question of interference between KTHO's 590 kc proposal and KCRL's 780 kc proposal; that there was no assurance that the KCRL application would ever be granted; and that, in any event, it was unfair to withhold action with respect to KTHO's application until the conclusion of the comparative hearing involving the seven other applications. KTHO, furthermore, submitted field intensity measurement data to show that the proposed KCRL operation would not, in fact, cover KTHO's proposed service area, as asserted by KOWL. KTHO's data was based on measurements of existing broadcast signals from KOH in Reno.

In its decision of June 7, 1967, the Commission found that KTHO's initial measurement data had failed to establish that the proposed KCRL nighttime limitation contour would not cover KTHO's white area inasmuch as the KTHO site was 6.5 miles from the direct path between the proposed KCRL site and the KTHO site.

The Commission found therefore that the KCRL proposal was mutually exclusive with the KTHO application. The Commission did find at that time, however, that KTHO had established that its present transmitter site was often made inaccessible by the unusually heavy snowfall in the area and the daytime portion of KTHO's application standing alone was acceptable. The Commission ordered that the KTHO application be accepted for filing on the condition that it be amended so as to delete the request for nighttime operation.

Emerald Broadcasting Co. (KTHO), 8 FCC 2d 443, 10 RR 2d 267 (1967).

After KOWL's initial success in delaying the nighttime application, KTHO retained the firm of Hammett & Edison, Consulting Radio Engineers, to determine the extent to which the proposed operation of KCRL could provide nighttime interference-free service to the area which would receive service from the proposed nighttime operation of KTHO. KTHO undertook the expense of installing and operating a test transmitter and antenna system at the KCRL site near Reno to permit the taking of further field-intensity measurement data. As a result of the measurements, it was concluded that no portion of the nighttime interference-free service area of the proposed KCRL operation would overlap any portion of the proposed

nighttime interference-free service area of KTHO. (Engineering Statement of Edward Edison, Consulting Radio Engineer, Appendix to October 17, 1967 Application, pp. 1-2.)

KTHO filed a new application for nighttime service on October 17, 1967. As noted by KOWL in its brief before this Court, the engineering specifications in the new application were identical to those in the first application (KOWL Brief, p. 4). However, this time, after making the additional expenditures, KTHO succeeded in meeting the burden of documentary proof imposed as to the characteristics of transmission from the projected transmitter in Reno.

However, five and one-half months later, on the first of April, 1968, KOWL once more appeared in the proceeding with new allegations. It petitioned the Commission to deny the KTHO application this time on the basis that:

- a. "The market cannot support two fulltime stations.
- b. "Serious questions are raised in regard to the financing of the proposal.
- c. "Applicant does not possess requisite character qualification and for this reason must be denied."

In the petition to deny, KOWL charged that ". . . should the pending application of KTHO be granted, the competition will be intensified and the service of KOWL jeopardized" (p. 1, para. 1).

It made the statement that "Should the application of KTHO be granted, the meager revenue now available to KOWL will be decreased, thus jeopardizing the ability of KOWL to provide fulltime programming," and submitted that "the operation of KTHO could not be self-sustaining due to the limitations of the market and that the fulltime operation of KOWL will be seriously jeopardized" (pp. 2-3, para. 4). Appended to KOWL's petition was a sworn statement by KOWL's Vice President and General Manager in which he stated that "It is unconceivable to me that another fulltime facility is presently needed in this area, because of the vital lack of economic support" and declared that ". . . the granting of additional fulltime facilities in this small market could seriously endanger the existence of both stations, regards a normal profitable operation, overall" [sic].

However, nearly nine months later when KOWL's own license came up for renewal, KOWL quickly lost its interest in arguing the Carroll issue.^{1/} On December 12, 1968, the Chief of the Com-

^{1/} The name comes from the decision of the Court in Carroll Broadcasting Co. v. FCC, 103 U.S. App. D.C. 346, 258 F.2d 440 (1958). The Court held there that an existing licensee has standing to contest the grant of a competitive license for the reason that "economic injury, while not in and of itself a matter of moment, becomes important when on the facts it spells domination or destruction of service." The Court has made clear that it is the public interest that is the focus of concern, and not that of the protestant. However, an unscrupulous competitor who might seek to raise such an issue merely to delay the grant of a license would be given second thoughts when he was acquainted with the Commission's holding in Southern Utah Broadcasting Co., 10 FCC 2d 320, 11 RR 2d 450 (1967), in which the Commission held that an intervening licensee's renewal application must be set aside until the Commission had made its determination with regard to the pleadings relating to the application of a competitor's new service.

mission's Renewal and Transfer Division informed KOWL that, in light of its petition to deny the KTHO application on economic grounds, the Commission had placed its application for license renewal in deferred action status, pending the consideration of the issues raised by the petition. After eight days, KOWL responded, stating that "Neither that Petition nor any other KOWL pleading in the proceeding has attempted to raise sufficient grounds on which to base a so-called Carroll issue."

However, before dropping the Carroll issue, KOWL found another issue in the evolving area of the Commission's directives concerning ascertainment of community needs. KOWL raised the issues for the first time in the October 10, 1968 Supplement to Petition to Deny.

A long exchange of pleadings followed KOWL's second intervention. 2 /

2 / These included KTHO's Opposition to Petition to Deny and Further Request for Expedited Action of April 15, 1968; KOWL's Reply of April 22, 1968; KTHO's application amendment of August 26, 1968; KOWL's Supplement to Petition to Deny filed October 10, 1968; KTHO's application amendment of November 1, 1968; KTHO's Opposition to KOWL's Supplement to Petition to Deny of November 1, 1968; KOWL's Reply filed November 14, 1968; the Supplement to KTHO's Opposition to KOWL's Supplement to Petition to Deny of November 26, 1968; KTHO's letter of March 14, 1969, requesting expediting consideration; KOWL's letter of March 25, 1969 opposing the KTHO request; KTHO's application amendment of April 28, 1969; KOWL's May 13, 1969, Further Petition Based on KTHO Amendment of April 28, 1969; KOWL's May 20, 1969, Addendum to that Petition; KTHO's Opposition to KOWL's May 13, 1969, Further Petition filed May 26, 1969; KOWL's Reply of June 5, 1969; KTHO's June 12, 1969, Addendum to its May 20, 1969, Opposition; KTHO's application amendment of April 9, 1970; KOWL's April 24, 1970, Comments in Response; KTHO's Opposition to KOWL's Comments in Response, dated May 4, 1970.

In certain instances where the Commission felt that there might exist possibilities of significant questions of fact, it sought and received supplementary information from KTHO. Finally, on May 20, 1970, after full consideration, the Commission granted KTHO's application for nighttime operation and dismissed all of KOWL's allegations. The Commission found that "KOWL's allegations with respect to the economic aspect of its petition are vague, generalized and conclusionary" and "that KOWL has failed to raise a material or substantial question of fact that would require a hearing on the issue of the area's ability to sustain two fulltime AM stations without a net loss or degradation of service to the public." (para. 5) The Commission found "that the applicant has made a good-faith effort to ascertain the problems and needs of its area and that this effort satisfactorily complies with our requirements." (para. 14)

The Commission concluded that "there are no substantial or material questions of fact which warrant designating this application for hearing; that the applicant is qualified to construct and operate as proposed; and that a grant of the application is in the public interest." (para. 15)

Argument

A. Commission's Statutory Mandate
and Judicial Review

The Commission found that there were no substantial or material questions of fact with respect to the KTHO application which warranted designating it for hearing; that KTHO is qualified to construct and operate as proposed; and that a grant of the application is in the public interest.

In its brief before this Court (p. 9), KOWL cites this Court's decision in Southwestern Operating Co. v. FCC, 122 U.S. App. D.C. 137, 351 F. 2d 834 (1965) for the proposition that, if the Commission is not able to make such findings, it is, by law, required to designate such application for an evidentiary hearing. The FCC, however, did in this proceeding make the appropriate findings under Section 309(d)(2) of the Communications Act of 1934, 48 Stat. 1085, as amended, 47 U.S.C. §309(d)(2). In its Southwestern Operating Co. decision this Court recognized the impropriety of overturning such a determination by the Commission for light reasons. The Court stated there that "Although we have no doubt that Congress intended to vest in the FCC large discretion to avoid time consuming hearings in this field wherever possible and we would ordinarily defer to that purpose, special

features of the record before us cause us to conclude that in this instance the denial of a hearing fell outside the range of legislative contemplation.^{3/} In that case "special circumstances" were found to exist with respect to what appeared to be the cutting short of consideration of a serious Carroll issue on the basis of a mere pleading nicety.

However, as indicated above, when faced with the possibility of its own license renewal being delayed by its own delaying tactics against KTHO, KOWL chose not to assert a Carroll issue in the proceeding. The Court can feel assured that KOWL has lost no opportunity to plead at great length any issue for which it could safely conjure up the slightest hint of relevance. The Commission has listened to all of KOWL's allegations for years and after prolonged and careful consideration found them to be unsupportable. The Court should overturn the Commission's determination only if a thorough examination shows it to be arbitrary, capricious or unreasonable. As stated by this Court, in a decision cited by KOWL, West Michigan Telecasters, Inc. v. FCC, 130 U.S. App. D.C. 39, 396 F. 2d 688 (1968):

^{3/} P. 138. It may also be noted that in footnote 2 on that page, this Court noted "the temptation to an existing licensee to postpone as long as possible the advent of competition" with respect to the Carroll issue.

"Admittedly, the scope of our review is quite narrow; we defer to the expertise and experience of the Commission within its field of speciality and would reverse only where the Commission's position is arbitrary, capricious or unreasonable. . . and it is clear that the decision of when hearings are necessary or desirable to clarify issues is one which lies in the first instance with the Commission."

It is not the Court's function or authority to superimpose its opinion upon the legitimate proper action of an administrative agency. Northeast Broadcasting Inc., v. FCC, 130 U.S. App. D.C. 278, 400 F 2d 749 (1968); Tampa Times Co. v. FCC, 97 U.S. App. D.C. 256, 230 F 2d 224 (1956); and Pinellas Broadcasting Co. v. FCC, 97 U.S. App. D.C. 236, 230 F 2d 204, cert. denied 350 U.S. 1007, 76 S. Ct. 650, 100 L. Ed. 869 (1956). In the absence of a showing that the Commission's decision is arbitrary or unreasonable, the Court should not substitute its view for that of the Commission. National Broadcasting Co., v. FCC, 124 U.S. App. D.C. 116, 362 F 2d 946, (1966). The decision as to whether to order a hearing pursuant to Section 309 of the Communications Act is one entitled to the Court's customary deference to the Commission's judgments. American Federation of Musicians v. FCC 123 U.S. App. D.C. 74, 79; 356 F 2d 827 (1966).

Section 309(d)(2) of the Communications Act requires that when, as here, the Commission finds, on the basis of the application, the pleadings filed, or other matter which it may officially notice, that there are no substantial and material questions of fact and decides to deny a petition opposing the application, it must "issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition." (Emphasis added.) The Commission's opinion is required to be concise and need not explicitly dispose of all the frivolous, vague or incidental assertions contained in an intervenor's petition. The Commission is under no compulsion to address in the text of its decision each and every assertion made by an intervenor. Contradictory allegations and affidavits which create some possibly unresolved factual issue do not invariably necessitate an evidentiary hearing. Broadcast Enterprises, Inc. v. FCC, 129 U.S. App. D.C. 68, 390 F 2d 483 (1968).

We note that KOWL in its brief (p. 10) quotes the Supreme Court's decision in the Permian Basin Area Rate Cases, 390 U.S. 747 (1968) to the effect that, in view of the limited scope of judicial review, it will "function accurately and efficaciously only if the Commission indicates fully and carefully the methods by which, and the purposes, for which it has chosen to act." KTHO would hardly

dispute this proposition. However, we can hardly avoid being struck by the huge disparity between the very important and intricately complex issues treated in that case and the patently contrived, trivial and immaterial issues which KOWL has attempted to generate in this proceeding. One would hardly expect a regulatory agency to verbalize as comprehensively or in such detail with regard to the various assertions made here as it would with regard to issues as complex and of such public impact as those contained in the Permian Basin Area Rates Cases. KOWL seems to lack that very practical perspective and, although it might wish to make this matter appear as grossly complicated as the Permian Basin Area Rate Cases, we will see that indeed this is essentially a rather simple regulatory matter, when shorn of the various attempts made by KOWL to confuse issues and impose delay. The ensuing discussion with respect to each of the issues propounded by KOWL should make it clear that the Commission's treatment was more than adequate.

B. KTHO's Ascertainment of Community
Needs and Interests

In its Memorandum Opinion and Order of May 20, 1970, the Commission reviewed KTHO's efforts with respect to ascertaining community needs and came to the conclusion that KTHO had made a good faith effort to ascertain the problems and needs of its area and that this effort satisfactorily complied with the Commission's

requirements. The Commission concluded that no purpose would be served by conducting further inquiry with respect to this showing and that the specification of the "Suburban" issue is not warranted (para. 14). The Commission reached this conclusion after long and careful consideration.

In its resubmitted and modified application of October 17, 1967, for construction permit to change hours of operation from daytime to unlimited, KTHO had provided the Commission with a listing of 89 educational, religious, eleemosynary, and special civic organizations together with business leaders and State and local governmental officials with whom KTHO has been consulting on a continuing basis to ascertain the needs of the public it serves (Exhibit 1). KTHO reported to the Commission that, as a direct result of its continuing consultation, it had determined that the most significant needs and interests of the South Lake Tahoe area were (Exhibit 2):

- a. Weather, road and ski conditions.
- b. Articulation of the many problems resulting from the establishment of South Lake Tahoe as a newly incorporated city.
- c. News of the major business of the area - tourism.
- d. General local news and information.

In Exhibit No. 3 of this application, KTHO described how it proposes to meet these expressed needs and interests. Specifically,

with respect to weather, road and ski conditions, KTHO indicated that it would continue to broadcast four weather reports per hour through the expanded hours of operation. Additionally, for six months of the year, KTHO would continue to provide a "Weather and Road Report" telephone service for its listeners whereby they could call at any time a number repeatedly announced on the air to receive current road conditions and weather forecasts. KTHO also indicated that the expanded hours would receive its regular series of direct reports from the United States Coast Guard regarding the weather and water conditions of Lake Tahoe. Similarly during the ski season, KTHO would continue to regularly broadcast skiing conditions and weather reports at the five major skiing areas in the Tahoe Basin.

Pointing out that the new city of South Lake Tahoe had faced multiple problems in the year and a half since its incorporation, KTHO informed the Commission of a KTHO program conducted by the South Lake Tahoe City Manager in which he would answer questions telephoned in by the public. KTHO indicated that it was currently responding to the public interest in tourism by an interview program broadcast three times a week. With respect to general local news and information, KTHO reported its exclusive arrangement with the local newspaper, the Tahoe Daily Tribune for the furnishing of local news for the station,

including one-the-spot reporting by Tribune staffers of important local events. KTHO also reported its successful efforts to have service organizations telephone their news to the station so that KTHO could broadcast announcements in the voice of spokesmen of the appropriate groups rather than by the use of a station announcer reading from written submissions.

Four months after the filing of KTHO's second application, the Commission adopted a significant decision on which KOWL thereafter premised a new line of attack. The Commission, on February 21, 1968, reversed its Review Board's refusal to add a "Suburban" issue in the comparative hearing involving the Minshall Broadcasting Company and the University City Television Cable Company. Minshall Broadcasting Co., Inc., 11 FCC 2d 796, 12 RR 2d 502. The Commission's decision in that case involved the addition of an issue to a comparative hearing already taking place with respect to other issues. The Minshall hearing furthermore dealt with mutually exclusive applications, which is not the case here. In that case, University City's principals were, as the Commission noted, not local residents. In its initial application, University City had only indicated that four persons were contacted and none had made suggestions for programming. Even after the Commission had requested a further submission with respect to the ascertainment of community interests, University City only presented some nebulous suggestions from a total of ten people.

Nearly a half year later, on August 22, 1968, the Commission released its Public Notice Relating to Ascertainment of Community Needs, 33 F.R. 12113, 13 RR 2d 1903. This statement clarified the documentation required by the Commission of applicants generally with respect to ascertainment of community needs.

The Commission noted in its decision in the present case (para. 9) that KTHO's initial showing with respect to ascertainment of community needs was submitted prior to the Commission's issuance of the Minshall doctrine and the Public Notice Relating to Ascertainment of Community Needs. KOWL charges that the Commission ignored its own precedent when it "charitably" insisted that KTHO's pre-Minshall showing should be regarded "less severely" as a result. KOWL argues that the same standards existed at the time KTHO filed its application. Obviously, however, if this were the case, there must have existed some ambiguity in the matter since the Commission's own Review Board has reached a totally different conclusion in the Minshall case. KOWL cites for its proposition the Commission's decision in Sioux Empire Broadcasting Co., 16 FCC 2d 995, 15 RR 2d 961 (1969). In that case the Commission reviewed its developing policies with respect to the applicant's efforts to ascertain community needs. In reports made in 1960 and 1965, the Commission had indicated in a very general way its policy that "the principal ingredient of the

licensee's obligation to operate his station in the public interest is the diligent, positive and continuing effort by the licensee to discover and fulfill the tests, needs, and desires of his community or service area, for broadcast service." Report and Statement of Policy Re: Commission En Banc Programming Inquiry, FCC 60-970, released July 29, 1960, 20 RR 1901, 1915. In the 1965 Report and Order the Commission stated that it "has an interest in how the licensee discovers the needs of his community and what he does to meet those needs." In the Matter of Amendment of Section IV (Statement of Program Service) of Broadcast Application Forms 301, 303, 314 and 315. 1 FCC 2d 439, 442, 5 RR 2d 1773. Thus, the Commission's teaching prior to the Minshall decision had made clear the substantive obligation of its licensees to discover and fulfill the needs of the community. What was not so clear was the type of showing that would have to be made by applicants for each type of application and in each set of circumstances. The Commission's Minshall decision and its August 22, 1968 Public Notice provided some guidance with respect to appropriate showings that would be expected. (See paragraph 10 of the Commission's decision in Sioux Empire Broadcasting Co., supra.)

It should be noted that even the Commission's guidance in the Minshall decision did not leave the nature of the showing required of KTHO free of ambiguity. In contrast to the situation in the Minshall case:

1. KTHO was already an operating station with all the advantages of frequent informal local contacts which develop as a result of its broadcasting activities;
2. KTHO was only seeking a construction permit for increased hours of operation and not an entirely new license;
3. KTHO was not already involved in a hearing on other issues;
4. KTHO's application did not involve a contest with other mutually exclusive applications and thus did not require greater scrutiny on the part of the Commission;
5. KTHO's initial showing with regard to its efforts to ascertain community needs was far greater and more complete than that made by University City in the Minshall proceeding.

It might be well to note in passing, however, that in Andy Valley Broadcasting System, Inc., 12 FCC 2d 3, 12 RR 2d 691 (1968), a month after the Minshall decision, the Commission found that "notwithstanding the fact that Andy Valley's preparatory efforts initially

may have been less than adequate, a reasonable basis now exists for finding that the applicant has adequately ascertained the needs and interests of the public. . . ." 12 RR 2d 691, 694. It is also significant to note that in that case, the Commission found that "the persons interviewed and the organizations canvassed by the applicant, though comparatively few in number, nevertheless represent a cross-section of informed opinion and group interest in the Auburn community," ibid. The Commission's decision reflects that only 15 individuals had been interviewed. Thus, the Commission's guidance appeared to be that interviewing or polling of large numbers of people was not required but rather that the applicant should seek "a cross-section of informed opinion."

The Commission's guidance with respect to the appropriate showing became more specific in its August 22, 1968 Public Notice, supra. In that notice, the Commission stated that the information mentioned was requested "for increased facilities serving a substantial amount of new area or population" (emphasis added). It did not, however, state whether such showings had to be made with respect to applications for new nighttime service within an area already served by the applicant during the daytime.

Only four days after the Commission's notice, on August 26, 1968, KTHO filed an amendment to its application which included a section on service philosophy and programming (pp. 4-5). KTHO pointed out that it had recently installed four news mobile units, two in vehicles, one in a boat and another in an airplane. An immediate result of this expansion of news activities was the development of a program service completely unique to the area called "Dateline Tahoe." This is a daily series of live, on-the-spot news and public affairs reports from KTHO's four mobile units. The service resulted in greatly improved public service programs (for example, reports from City Council meetings) and on-the-spot coverage of news events such as fires, accidents, sports events, civic functions, traffic conditions, weather and ski reports. KTHO also included in its filing detailed statistical information concerning the area, such as demographic data with both current and projected population figures, employment, industry in the area, characteristics of the community, school enrollment figures, climate and tax structure.

On November 1, 1968, KTHO filed a further amendment. This included public petitions by some 200 persons for a grant of KTHO's full-time application. These petitions were addressed to the Commission by residents of the South Lake Tahoe area who state that they "would like to have KTHO radio, AM-590 on the Dial on the air 24

hours a day instead of having to go off the air every day at Sundown."

The amendment also included 42 letters to the Commission from members of the public who made various expressions of need, including the following:

- One station cannot meet all local needs.
- KOWL's service area is restricted in that its nighttime signal is weak. "Outside" signals do not come into this area.
- The public is dissatisfied with KOWL's programs and prefers KTHO's program service.
- Immense population growth requires a second fulltime service.
- KTHO alone has mobile news units to cover the area.
- Most meetings and community activities in the area are held at night.
- There is a need for competitive radio services, and businesses in the area suffer from lack of competition in radio advertising time.
- KTHO has fewer technical problems than KOWL.
- KTHO's fulltime operation would materially benefit Civil Defense activities in the area.
- Severe weather problems require 24-hour radio service.

The Commission's Broadcast Bureau nevertheless stated in a letter dated April 14, 1969, that KTHO should provide additional documentation to show specific suggestions from the public as regards community rather than programming needs. In response, KTHO filed a further amendment to its application on April 28, 1969. The amendment pointed out that many of the materials contained in the earlier filings had actually pinpointed specific community needs. However, the amendment further detailed continuing local contacts with community leaders with specific reference to the KTHO plans for full-time broadcasting in an effort to make a showing more responsive to the Commission's August 22, 1968, Policy Statement. In this amendment, KTHO specifically discussed ten areas of community needs, together with names of individuals contacted, the organizations represented, KTHO's evaluation of such needs, and its plans to meet such needs. These needs fell into the following categories (pp. 6-20):

1. Expansion of the South Lake Tahoe community, outside the immediate shore line, built-up area of the community.
2. Educational problems involving South Lake Tahoe high school.
3. Tahoe College.
4. Recreation in nighttime hours for young people within the South Lake Tahoe area.

5. Meyers Elementary School.
6. Lake Tahoe airport.
7. Traffic congestion on U. S. Highway 50.
8. Water pollution.
9. Domestic problems - divorce and broken homes.
10. Snow hazards.

On December 19, 1969, the Commission released a Notice of Inquiry entitled "Primer on Ascertainment of Community Problems by Broadcast Applicants," 34 FR 20282, FCC 69-1402 in response to a request for clarification by the Federal Communications Bar Association. The Commission sought comments on the "Primer" before finalizing it. The Commission made it clear that applicants whose showings might be deficient could amend as a matter of right prior to a designation of hearing and even during a hearing if the particular deficiency was due to lack of clarity on policy reached by the Primer. The proposed primer would make such a showing incumbent upon applications for construction permits for new nighttime service by an AM station (Answer to Question No. 1). The Commission made it clear that the purpose of the consultation with community leaders was not to elicit program suggestions, but rather what the person consulted believes to be the problems of the community from the standpoint of his particular group (Answer to Question No. 19). It

also made it clear that it is not required that the applicant's evaluation of the relative importance of the community problems be listed. Where the applicant's proposals do not appear responsive to the community problems disclosed by his consultation, the Commission will send him a letter of inquiry (Answer to Question No. 25). The applicant need not necessarily plan broadcast matter to deal with all community problems discussed, but he is expected to determine on a good faith basis which of such problems merit treatment by his station and by what kind of broadcast matter (Answer to Question 26). The Commission recognized that the appropriate portion of a station's programming to be devoted to dealing with community problems could vary from community to community and from time to time within a community. Initially this is a matter for the good faith judgment of the applicant (Answer to Question No. 32).

On February 12, 1970, the Commission, through the Chief of the Broadcast Facilities Division, sent KTHO a form letter which had been sent to all applicants, affording an opportunity at the option of the applicant, to file more information on ascertainment of community problems, needs and interests. KTHO decided to file additional information and submitted on April 9, 1970 a 19-page account of additional survey efforts. This material, reflecting interviews with some 52 individuals, represented the seventh submission of information

concerning KTHO's determination of local community needs, problems and interests which would be served by its fulltime operation. In making this submission, KTHO expressed the belief that its past efforts in this regard had been in substantial harmony with criteria set forth in the Commission's recent Notice of Inquiry. The individuals interviewed for this seventh submission of information included: a general contractor, a representative of the South Lake Tahoe Chamber of Commerce, a bank manager, a postmaster, a housewife, an insurance man, a title company officer, a high school teacher, a college professor, a motel manager, a power company official, a fire chief, a public relations man, a high school principal, an elementary school principal, a forest ranger, a newspaper publisher, a welder, high school students, a machine shop owner, secretaries, a heating oil businessman, an employee of a casino, a manager of a dump office, a musician, a retired man, a manager of an automotive firm, a gas company serviceman, a judge, a grocery store clerk, and an optometrist. Among the community interests discussed were: protection of the environment; local economic fluctuations resulting from seasonal and weekend influxes of tourists; lack of recreation facilities; South Lake Tahoe's tax base; civic architecture; drug abuse; high crime rate; lack of centralized community leadership; condition of city streets and area highways; accessibility of Route 50; lack of

convention facilities; lack of educational and job opportunities for high school graduates; administrative problems of South Tahoe High School; lack of Junior or State College campus; need for a community center open at all hours; need for PTA; the need for more major retail businesses in the area; the need for more fire hydrants; the need for better street drainage; the manner of scheduling high school classes; the need for house delivery of mail and availability of Post Office window services on Saturdays; lack of adequate power on the area's television translator system; inequitable tax assessment of similar areas; the need for widening Route 50 to four lanes; the snow removal problem; alleged police harrassment of long-haired, non-conformist individuals; traffic problems; the lack of public transportation; lack of competition in business, resulting in slovenly service and parts availability; hippies; litter; and welfare recipients.

The interviews were conducted by responsible KTHO officials. KTHO has retained the original interview survey forms. Each of these forms contains the signature of the person conducting the interview and each form is also signed by the person who was interviewed.

The April 9, 1970, filing also pointed out that KTHO's General Manager, Program Director and Local Sales Manager have an accumulated Lake Tahoe residency of 33 years. Such long-term residency is obviously an important asset when planning continuing

surveys of public interests and needs and is of particular use in determining the leading spokesmen of the area.

KTHO interviewed: the Mayor of South Lake Tahoe, the President of the Lake Valley Taxpayers Association, the President of the South Lake Tahoe Chamber of Commerce, the Chief of Staff of the local hospital, the Acting Chief of Police of South Lake Tahoe, the paid professional Executive Vice President of the South Lake Tahoe Chamber of Commerce, the manager of a local bank, the Postmaster of South Lake Tahoe, the President of the South Lake Tahoe Soroptimist Club, the President-Elect of the Lake Tahoe Jaycees (KTHO's Local Sales Manager was President of the Jaycees when the last survey was taken), the Captain of the local Sheriff's Office, the immediate past-President of the Lion's Club, the President of the Rotary Club, the former President of the South Lake Tahoe Ministerial Association, the Officer-in-Charge of the local California Highway Patrol sub-station, the local President of the California Motel Association, the President of the Kiwanis Club, the President of the Auxiliary of the local hospital, the President of the South Lake Tahoe Historical Society, the Fire Chief of South Lake Tahoe, the Principal of the local high school, the Principal of one of the local elementary schools, a District Ranger of the U. S. Forest Service, the Publisher of the local daily newspaper, the Exalted Ruler of the Lake Tahoe Elks Club, the President of the South Lake

Tahoe High School Key Club (a youth group sponsored by the South Lake Tahoe Kiwanis Club), the President of the local chapter of the National Secretaries Association, the Justice of the local Judicial Court and the Vice Commander of the local Coast Guard Auxiliary.

KTHO had, of course, already been aware of many of the community needs uncovered in its previous set of interviews reported to the Commission. Nevertheless, the interviews were an aid to KTHO in focusing greater attention on the contemporary problems most affecting the area. Most of the problems cited had already been discussed at some length on a program that was broadcast weekly for some two and a-half years on KTHO titled "Ask Your City Manager" with Mr. John Williams, who had been the first city manager of South Lake Tahoe. From time to time, guests knowledgeable of local problems appeared on the program. Issues of local importance were given additional coverage in KTHO news programs. KTHO staff members covered events of local interest with tape recorders for the purpose of providing listeners with first-hand, on-the-scene reports. This on-the-spot news coverage was given increased emphasis on April 6, 1970, with the addition of a fulltime local newsman to the KTHO staff. This augmentation of the KTHO staff will enable KTHO not only to increase local news coverage, but most important, enable it to prepare special programs devoted to discussing particular issues and problems of the community. Such

programs are to be broadcast on a regular basis and will thoroughly explore a particular issue of a number of related issues, with the opportunity for area residents to telephone and discuss the problems on the air. KTHO is scheduling these programs in the evening hours as well as during the day. As indicated in KTHO's application amendment of April 9, 1970 (page 16), one of the news programs that would be added to the KTHO operating schedule would be a regularly scheduled telephone call-in to be broadcast in the evening hours when persons are more easily available to appear as guests. During the day, it would be difficult for a program of this type to be successful since many potential listeners would not have access to radios during the working hours and therefore, could not actively join in the discussions. The very essence of a program of this type is widespread participation by the listening audience.

In the last filing before the Commission, KTHO provided further information with respect to its public service spot announcements (p. 17). KTHO discussed its programming with respect to tourism, drug abuse, recreation for the young people of the area and other community concerns. KTHO pointed out its affiliation with the ABC American Entertainment Radio Network together with its United Press International News Service. KTHO pointed out that its increased emphasis on discussion programs would be expected to stimulate

listeners to raise other significant problems that will be of concern to the community. Thus, the discussion programs will not only serve as a means of helping KTHO service the presently known needs of its listeners but will provide an additional mechanism by which KTHO can keep abreast of evolving community interests, concerns and needs. Thus, the Commission's desire that stations keep fully and currently informed of community needs will be further effectuated by introduction of nighttime discussion programming permitting widespread community participation. This will contribute to the important continuing process of community interaction and will compliment in an informal but effective way the information obtained in the development of formal documentation required under the Commission's evolving guidance.

KTHO has always regarded its obligations to its local audience as of paramount importance. KOWL concedes before this Court that KTHO sought a representative cross-section of community leaders in its April 9 amendment (p. 37 of its Brief). Nevertheless, KOWL then proceeds to complain that KTHO never amended its proposed programming schedule to reflect the needs evidenced in KTHO's showings of its ascertainment of community needs.

As the foregoing discussion has indicated, this is simply not true. Additional program proposals, such as the one for the nighttime public discussion program, have been made and KTHO's staff and equipment have been augmented to increase the effectiveness of public service programming. The simple fact is that KTHO has always diligently endeavored to make its

programming meet the needs of its community. At the outset its ascertainment methods had generally been of the kind more characteristic of a small, relatively lightly populated area and where station personnel have frequent informal contacts with the public rather than of the more impersonal but more easily documentable kind characteristic of larger service areas. During the five years through which KOWL has managed to delay the introduction of competition in nighttime broadcasting by KTHO, the Commission's policies with respect to the furnishing of evidence of such ascertainment of community needs have undergone a process of evolution. If KTHO has at times found some difficulty in keeping up with the Commission's evolving standards with respect to the documentation required,^{4/} its day-to-day community contacts have never flagged nor has its sense of responsibility towards the community.

The present situation in many ways is analogous to the one which resulted from the roadblock imposed by KOWL in 1967. In 1967, there never was any objective truth with respect to the KOWL allegation that a certain station that might possibly be licensed in Reno at some future date would provide a signal of a strength such

^{4/} The Commission and the industry are similarly concerned and confused. At present, the most recent Commission effort at articulation of the law is under review. The December 19, 1969, proposed Primer is being revised in FCC-Industry-Bureau of the Budget conferences.

as to destroy KTHO's nighttime white area. On that occasion the Commission felt it necessary that KTHO meet a greater burden of proof with respect to the KOWL assertion.

After spending enough money and time in building and operating a test transmitter at the proposed site in Reno and paying additional fees for advice from specialized consultants, KTHO met that burden of proof. Now for the second time, KTHO after spending more time and more effort, has once again met the requisite burden of proof with respect to another fundamentally baseless allegation raised by KOWL for the purpose of delay and harrassment. The methods of ascertainment of community needs undertaken by KTHO during this proceeding have produced useful ideas for future programs. However, the initial proposals of KTHO envisioned the filling in of such program details at future points in time and KTHO had always anticipated that as more experience with nighttime programming was developing, KTHO could further strengthen its understanding of community needs and provide further innovations in its presentations. KTHO is of the view that it can now make the most progress in its continuing efforts to service community needs through the initiation of actual nighttime programming. Through this process

further insights can be developed into the constantly evolving patterns of community concerns. The Commission has reached the conclusion that KTHO has met the appropriate burden of proof with respect to its pre-grant showing. KTHO now wishes the opportunity to demonstrate what it can do to satisfy public needs. It is submitted that the action called for now is to enable KTHO to prove by actually broadcasting at night that it can do a better job for the public than can KOWL, which has taken such extraordinary steps to avoid such competition.

C. KTHO's Financial Qualifications

KOWL states before the Court that it did not question KTHO's financial capacity to put the nighttime facilities into operation (p. 40 of its brief). It does, however, appear to contest KTHO's financial capacity "to put the facilities into operation and then keep it operating for at least a year" (p. 41). If KOWL seriously thinks that there is a question about KTHO's ability to continue to operate at night, we are at a complete loss to understand the reasons why KOWL has waged its extraordinary fight for nearly five years to prevent KTHO from offering it nighttime competition. If there were a genuine suspicion of such financial incapacity on the part of KTHO, certainly KOWL would not have expended such large efforts to save KTHO from such an unwise waste of its resources.

The Commission, of course, did find KTHO financially qualified. KOWL now complains that the Commission did not make sufficiently detailed findings with regard to the various allegations of financial capacity it threw out over a period of years. It would scarcely be surprising if the Commission had not taken KOWL's allegations very seriously, but in fact the Commission very carefully weighed the relevance and plausibility of KOWL's numerous allegations and issued its decision with the appropriate findings. The Commission found that "KOWL's allegation with respect to the economic aspect of its petition are vague, generalized and conclusionary." (In re Application of Emerald Broadcasting Co., 23 FCC 2d 178 19 RR 2d 149, 151.) The Commission determined that "KOWL has not even attempted to support its allegations with the type of specific data required" (ibid.). The Commission noted that in its letter of December 23, 1968, to the Chief, Renewal and Transfer Division, counsel for KOWL took the position that KOWL did not wish to raise a "Carroll issue" (Carroll Broadcasting Company v. FCC, supra.) and concluded "that KOWL has failed to raise a material or substantial question of fact that would require a hearing on the issue of the area's ability to sustain two fulltime AM stations without a net loss or degradation of service to the public" (ibid.).

Nowhere in its pre-grant pleadings did KOWL allege facts controverting KTHO's financial estimates. Indeed, during all the years that KTHO's nighttime application was on file, the only allusion to those estimates was in a pleading of April 22, 1968, wherein KOWL alleged only generally that its competitor's estimates were unsupported. Nevertheless, KOWL appears before this Court and complains that "the Commission neglected to find whether the estimated expenses were or were not reasonable." Even now KOWL does not allege that these figures are unreasonable. The Commission has found KTHO financially qualified. The Commission's familiarity with financial statements for similar operations has led it to the conclusion that the financial resources shown by KTHO are sufficient to enable it to extend its present operation into nighttime hours. On the basis of its broad expertise the Commission has concluded that the expenses of KTHO's additional service will be adequately covered by KTHO's demonstrated resources.

Surely, the Commission with its vast experience in assessing the financial qualifications of thousands of applicants has the requisite expertise to gauge the reasonableness of KTHO's projected expenses. In view of the lack of specific assertions by KOWL to the contrary, the Commission would not be expected to articulate this rather routine exercise of expert judgment. If KOWL has some reason for doubting

the Commission's expert judgment in this regard, surely it has had more than adequate opportunity to make that known. KTHO's revenue and expense estimates were based on KTHO's actual operating experience in the market. As indicated in its pleading of April 18, 1968, and noted in the Commission's decision, since June 1967, KTHO's "revenues have kept pace with expenses so that KTHO has been self-sufficient" and KTHO had gross revenues of approximately \$100,000 for the one-year period ending March 31, 1968. KTHO's situation of concrete operating experience and demonstrated financial capability is quite different from the situation of the BCU-TV application for a new television license discussed in West Michigan Telecasters, Inc. v. FCC, 130 U.S. App. D.C. 39, 396 F. 2d 688. Here, the small incremental expense of extending an existing radio operation into night hours can be very adequately assessed by the Commission to be well within the resources of the principals involved.

KOWL attempts to attack this rather simple exercise of the Commission's broadcasting finance experience by stating with emphasis that KTHO has no experience operating a fulltime standard broadcast station (KOWL brief, p. 43). The key word,

which KOWL does not emphasize is "standard," which refers to AM only. KTHO does, in fact, have experience operating a fulltime FM station since 1966. The difference between AM and FM staff and operating expenses is negligible.^{5/}

KOWL appears to take the remarkable position that because KTHO had indicated in its 1967 application that it did "not rely on corporate income for the application" (Exhibit 7), that the Commission is somehow precluded from observing in 1970 that, since June 1967, KTHO has been financially self-sufficient. It is scarcely improper for the Commission to refer to the financial success enjoyed by KTHO in the daytime operation during the period that KOWL's dilatory efforts have held up the full-time application. As made perfectly clear in KTHO's August 20, 1968, amendment (p. 3), Messrs. Breckner and McBain reasserted their undertaking to bear full financial responsibility "to provide the funds for the full-time construction and operation, if necessary" (emphasis added). The

^{5/} Although the FM application was made only two weeks prior to the full-time AM application, it was unopposed by KOWL and the construction permit was granted on January 3, 1966. KOWL alludes to the FM operation on pages 3 and 39 of the brief in an attempt to further prolong the proceeding with yet another red herring by citing a new Commission policy on multiple ownership issued on April 6, 1970. It is quite clear that the new rules have no applicability to pending application tendered before April 3, 1968. Amendment of Section 73.35, 73.240 and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Station, 22 FCC 2d 306, 18 RR 2d, 1135, 1759. KOWL conceded that the rules do not apply to the KTHO application. The grant of the KTHO application will, however, serve to advance the Commission's basic objectives therein of fostering competition and promoting diversification of programming sources and viewpoints.

Commission was scarcely precluded from observing that such a personal commitment was not necessary.

During this long proceeding, KOWL alleged that KTHO investors, Robert W. Breckner and Donald C. McBain were financially overburdened with commitments to Crown City Broadcasting, an applicant for radio facilities in Pasadena. In the event that Crown City Broadcasting Company is successful in its Pasadena application, Mr. McBain is committed to provide \$53,000, none of which is attributable to his personal assets. As indicated in the Commission's decision, Mr. McBain has reached an agreement with the Santa Monica Bank for those funds. Mr. Breckner has pledged certain stocks to the bank as a guarantee for Mr. McBain's loan and Mr. McBain has pledged Mr. Breckner his Crown City stock as collateral for this guarantee. Mr. Breckner's lesser commitment to Crown City is provided from his personal assets. The Commission found that the financial statements filed by Mr. Breckner show sufficient assets to meet those commitments. The Commission further concluded that both Mr. McBain and Mr. Breckner appear to have sufficient assets to meet their commitments to KTHO.

In its brief before the Court, KOWL notes that Mr. Breckner had presented a June 30, 1968, balance sheet which showed current

assets of \$285,000 and current liabilities of \$10,000 (p. 44).

KOWL then complains that KTHO has not filed updated financial information, while waiting for its application to be acted upon, to reflect the effects on Mr. Breckner's stocks of "the steep 1969-1970 stock market decline." Surely, KOWL is grasping at straws. Are the delays created by KOWL's efforts to be compounded by repeated demands for updated financial statements on such fatuous bases as this? But then again, KOWL finds renewed hope that Mr. Breckner's financial resources may have become depleted since the time of filing his financial statement with the Commission by the heavy expense of Crown City's contested proceeding for the Pasadena station. Would KOWL have this Court order a further drawing-out of the KTHO proceeding, already so long delayed by KOWL, on the basis of a far-fetched possibility that financial resources may have become depleted in another proceeding. One cannot help but wonder, if such whimsical arguments were permitted to prevail, whether in the event that Crown City should be granted its application in Pasadena, an opponent there should demand that that proceeding be re-opened on the basis of the possibility that Mr. Breckner's financial resources may have become depleted by the prolonged KTHO proceeding. The simple fact of the matter is that, as the Commission found, both Mr. McBain and Mr. Breckner

have sufficient assets to meet their commitments to KTHO.

KOWL indicates in its brief (p. 43) that after the Commission had rejected its various allegations, it requested the Commission's Executive Director to grant it access to KTHO's confidential annual financial reports for the years 1967 to 1969. These "forms 324" are classified as not routinely available for public inspection by Section 0.457(d)(1) of the Commission's Rules and are used by the Commission for analytical purposes related to the economic aspects of the broadcast industry. The Executive Director refused to release these trade secrets, noting that there was "little to dispel the notion that KOWL is embarked upon a fishing expedition or otherwise intent upon securing useful trade secrets unobtainable by other means" (letter of July 10, 1970, p. 3). With an uncharacteristic lack of litigiousness, KOWL did not choose to exhaust administrative remedies and seek reversal of this order by the Commission pursuant to Section 0.461(d)(2).

As indicated in the Commission's decision, KOWL does not assert that the South Lake Tahoe community is unable to support two fulltime standard stations. It does not even boldly assert that KTHO is financially unable to expand its current broadcast activities. Rather it has beleaguered, first the Commission and now this Court, with vague allegations about peripheral matters in the hope of

finding some official collaboration in a series of fatuous attacks against its competitor.

D. KOWL's Attack on the Character
Qualifications of KTHO

In demanding a hearing on the basis of its character attacks upon KTHO and its employees, KOWL has outdone itself. KOWL with much fanfare, chooses to take issue with a number of incidental aspects of the voluminous submissions made by KTHO during this long proceeding. Realizing that its allegations, even if true, would not provide a basis for stopping its competition on their merits, KOWL artificially relates its assertions to the question of its competitor's "character." When the Commission does not appear to share its savoring of its snide attacks on its competitor's character, KOWL complains that the Commission has been delinquent in its statutory duty. It is obvious here, of course, that even if all the assorted imperfections alleged by KOWL in the various polls and reports of community contacts were true, this would still not afford a basis for rejecting the license with respect to any other issue in the proceeding. It would be a sorry day for the effective conduct of administrative proceedings when all a querulous competitor had to do to hold up the issuance of a license for a number of years was merely to pick out a few miniscule and unimportant fragments from a

lengthy record and allege that these were not merely erroneous or insufficient proof but examples of its competitor's dishonesty in order to force a Government agency to undertake a long hearing procedure on a "character issue." Is the inclusion of the issue of an applicant's character qualifications to be used merely as a device for a frightened competitor to pour forth a grab-bag of dissatisfactions with immaterial aspects of the pleadings in order to delay administrative action by a burdensome hearing?

KOWL has gone into great length about the alleged deficiencies in an informal 1966 petition for expedited consideration which contained some 865 signatures. KOWL does not think that KTHO provided enough supervision over the signing of this petition when it left copies sitting on supermarket counters (p. 19).

KOWL thinks it evidence of manifest lack of character on the part of KTHO that 85 of the 865 signers were school children (p. 18).

KOWL apparently thinks such signatures are grossly improper because it alleges that they were motivated by what KOWL apparently regards as misguided taste in one type of music.^{6/}

KOWL professes to find that 22 of the 865 signers were out-of-townners "whose names could fairly not be included as members

^{6/} Despite KOWL's innuendo to the contrary, this does not happen to represent KTHO's preference in music.

of the listening public prospectively KTHO served" (p. 19). (sic) It is not clear whether KOWL wishes to imply: (a) that the South Lake Tahoe area is not visited by large numbers of tourists, vacationers and parttime residents; or (b) that these visitors do not listen to radio broadcasts; or (c) that their listening preferences are not entitled to be taken into account. KOWL states that 23 of the 865 signatures were "invalid owing to a lack of any address." Conceivably, the Commission might wish to attach some lesser weight to these 23 signatures than to the other 842 signatures, but we fail to grasp the basis on which KOWL so authoritatively states that the signatures are invalid because addresses are not stated. Although KOWL appears to have some very definite ideas on how surveys must be conducted, it does not cite any source for rules governing the taking of surveys for petitions for expedited consideration, or for any other purpose involved in a Commission proceeding. Furthermore, KOWL not only has the temerity to argue that the petitions were invalid for the purpose for which they were submitted but are evidence of some sort of moral turpitude requiring the Commission to refuse KTHO's license on the ground of lack of character qualification. The weight to be attached to each of the 865 signatures might be argued at great length as an exercise in polemics, but for

what real purpose, except to delay this proceeding further, is not apparent to us.

With respect to KTHO's November 1, 1968, amendment, KOWL, once more in absence of any genuine substantive basis for its attacks, attempted to lay down another barrage of nitpicks under the banner of the "character issue." KOWL notes that the amendment contains forty-two letters of support together with an additional 200 informal endorsement signatures (KOWL brief, p. 21). KOWL complains that 11 of the letter writers also signed the endorsement sheets (p. 22). KOWL complains that six KTHO employees signed the petition endorsing KTHO and that three other signers had business relationships with KTHO (pp. 23, 24). There is scarcely any prohibition against KTHO employees or citizens involved in business contacts with KTHO from registering their desires for improved radio service along with the hundreds of other citizens of the South Lake Tahoe community. The degree of formality involved with the subject petition was not such as to require the addition of relevant biographical data with regard to the many signers. There is certainly no more impropriety in employees and business associates of KTHO in publicly expressing support of KTHO than there is in employees and business associates of KOWL in attacking KTHO.

As noted in the Commission's decision (para. 11), KOWL responded to KTHO's April 28, 1969, listing of needs and problems of South Lake Tahoe together with names of individuals from whom such needs were elicited, by submitting a number of affidavits from some individuals in which these individuals appeared to deny discussing the needs and problems indicated with KTHO representatives (KOWL's May 13, 1969, Further Petition). We shall examine some of the affidavits introduced by KOWL.

With respect to the community interest in Lake Tahoe airport, KOWL asserted that ". . . a contact was not in fact made" with Mark A. Smith (p. 2). It did not challenge the two other contacts made on this issue. In the "Opposition" of May 26, 1969, KTHO produced a letter from Mr Smith stating that:

"Mr. Donald McBain has been in contact with me regarding development and progress at the Lake Tahoe Airport. He has been working for the betterment of the area and the airport.

"Several months ago when I first met Mr. McBain, I was not aware of his connection with radio station KTHO."

With respect to public interest in nighttime hours for young people KOWL stated that Mr. Walt Little "had no discussions. . .

with KTHO" and that there was no contact with City Manager John Williams. It ignored the KTHO discussions with Mr. John Reid, Chairman of the City Council's special convention center committee. In response to the KOWL assertion, KTHO produced a letter from Mr. Little saying he had been contacted by KTHO as to supplying recreation outlets for the U. S. Olympic Team contenders and that KTHO's General Manager did serve on the entertaining and recreation committee. KTHO also submitted a letter from Mr. Williams in which he recalled that during February or March of 1968 he and KTHO's General Manager had, in fact, discussed the operation and conduct of a teen-age dance center.

With respect to the community interest in the Meyers Elementary School, KOWL introduced a letter from Mr. Magliari, the local Superintendent of Schools stating that he did not "feel compelled to meet with representatives of KTHO, or any other organization in order to counteract negative criticism." Mr. Magliari's disagreement with KTHO was in the characterization of the community interest in events at the schools as "problems." KTHO in its response introduced a later letter from Mr. Magliari petitioning the Commission to grant KTHO authority to operate on a 24-hour a day basis. Mr. Magliari informed KTHO's General Manager that any disagreement with the school district's policy on

the matter that may have existed was so minor that calling the matter an issue would be inaccurate.

With respect to local concern with respect to snow hazards, KOWL stated that one of the three persons contacted by KTHO, Mr. Bill Pillsbury, had not really been contacted. KOWL claimed that KTHO had made a "falsification" (p. 4). In its Opposition, KTHO introduced a letter from Mr. Pillsbury stating that:

. . . This letter is to advise you that my statement of May 5 was in error. It should have stated that I had not consulted with the party who had signed said amendment. However, I have previously consulted with yourself on the subject of snow hazards."

This means that a representative of KTHO had contacted Mr. Pillsbury, although not the same person who signed KTHO's amendment.

With respect to traffic congestion on U.S. Highway 50, KOWL challenges KTHO's reports on the John Gianotti and Joseph Geach contacts regarding the traffic congestion (p. 5). KOWL attached affidavits denying contacts by KTHO's Donald C. McBain. However, KTHO had never stated that Mr. McBain made these contacts. Mr. McBain signed the KTHO statement and this may have given rise to a misunderstanding. As indicated in an affidavit submitted by KTHO, in the Opposition, Mr. Gianotti and KTHO's General Manager, Mr.

Hankoff, were both present during a local Chamber of Commerce discussion of Highway 50. Similarly, Mr. Geach and KTHO's General Manager were both present during two other Chamber of Commerce discussions of this subject.

KTHO representatives characteristically contact many people every week during the conduct of station business. Talks range over a large variety of subjects, including community problems. As previously indicated, many contacts with members of the community were mentioned in the record before the Commission. Hundreds of other contacts could have been mentioned, if there were some productive purpose to such repetitive recitations. There was scarcely any need to single out a handful of people with whom community problems had not been discussed just to lie to the Commission about having talked to them. KOWL's shrill charges of perfidy against its competitor simply do not stand up against the test of common sense. There was no attempt to mislead the Commission by KTHO. Nor has the Commission been misled. There simply is no public purpose to be served by wasting a few more years of the Commission's time inquiring into the precise contents of a handful of conversations a few years old, when numerous such conversations are taking place every day in KTHO's continuing efforts to keep

abreast of community activities. The record is replete with reports of such contacts.

There is no serious public interest in establishing the precise contents of these conversations, as KOWL is well aware. KOWL is only attempting to distort the processes which the Commission has developed to protect legitimate public interests for the purpose of waging a private vendetta against KTHO. KOWL has exhausted every conceivable issue it could allege as to the KTHO application in order to delay competitive entry into nighttime broadcasting in the South Lake Tahoe area. The time has come when real competition in the market place must replace abusive distortion of administrative processes.

Conclusion

For the reasons set forth herein and in the Commission's Brief, the Court should uphold the actions taken by the Federal Communications Commission.

Respectfully submitted,

EMERALD BROADCASTING COMPANY (KTHO)

By Haley, Bader & Potts

/s/ Michael H. Bader

Michael H. Bader

/s/ William J. Byrnes

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Its Attorneys

October 26, 1970

APPENDIX

Communications Act of 1934, 38 Stat. 1085, as amended,
47 U.S.C. Section 309(d)(2)

"If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice, that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a) of this section, it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a) of this section, it shall proceed as provided in subsection (e) of this section."

The Federal Communications Commission Rules and Regulations, 47 C.F.R.:

Section 0.457(d)(1)... "Materials submitted to the Commission which contain trade secrets, or which contain commercial, financial or technical data which would customarily be guarded from competitors by the person submitting it, will not ordinarily be made available for inspection. A persuasive showing as to the reasons for inspection of such materials, and as to the Commission's authority to make disclosure in view of 18 U.S.C. 1905, will be required in requests for inspection submitted under §0.461. This category includes the following materials:

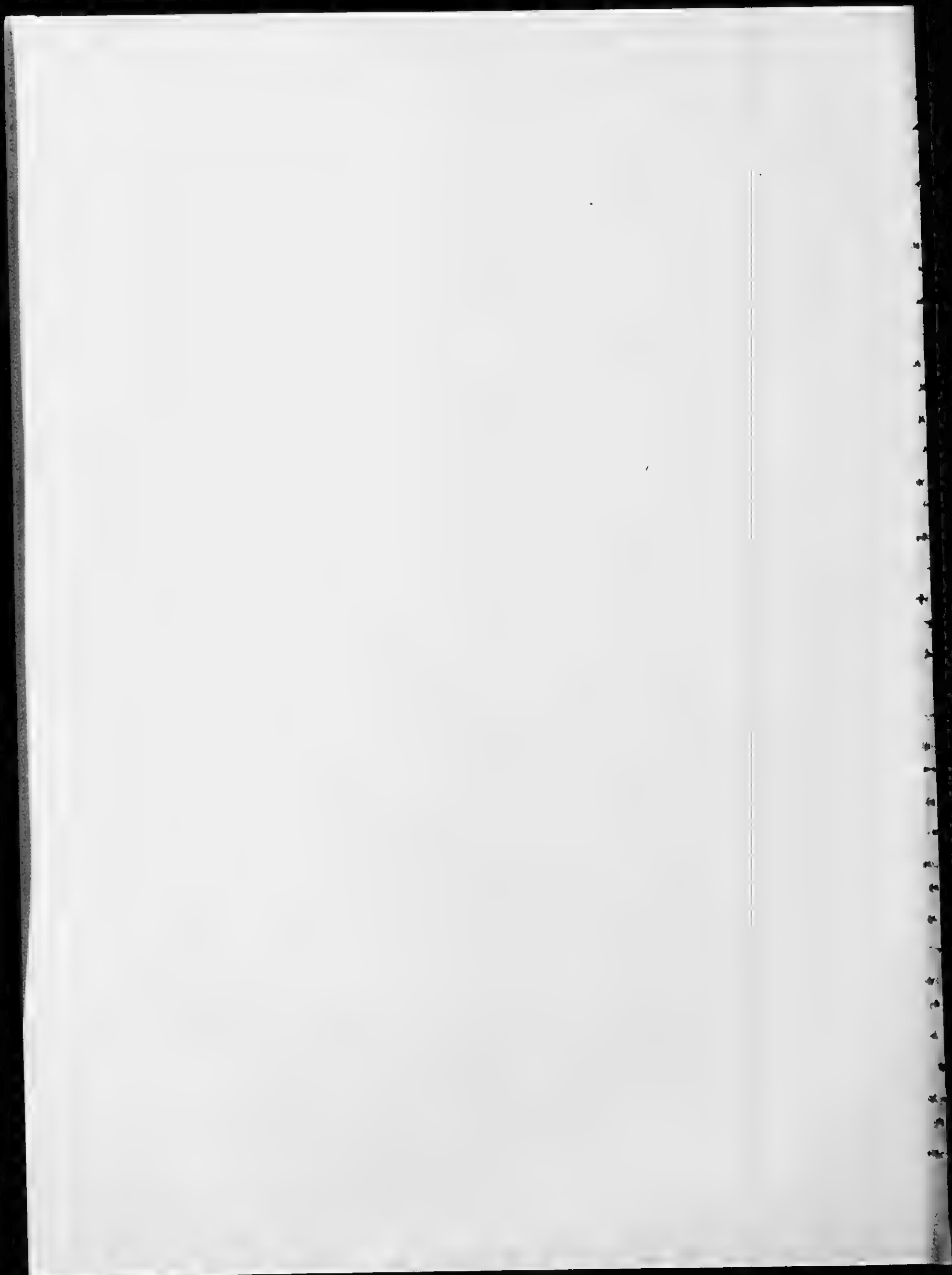
(i) Financial reports submitted by licensees of broadcast stations pursuant to §1.611 of this chapter or by radio and television networks.

(ii) Technical data submitted in connection with type acceptance, type approval or certification of equipment, except as set out in the Radio Equipment Lists."

Section 0.461(d)(2)... "If disclosure has been opposed under paragraph (b) of this section, the person who submitted the materials or the person who filed the request for inspection may file

an application for review by the Commission within 15 days after the order acting on the request for inspection is released. Responsive pleadings may be filed in accordance with §1.115(d) of this chapter. No order granting the request for inspection shall be implemented until the opportunities for review by the Commission and judicial review have been afforded, unless the Commission find, for reasons set forth in the order, that the public interest requires earlier inspection. In the latter event, the order will not be implemented until the opportunity to obtain a judicial stay of the Commission's Order has been afforded."

Section 73.24(b)(3)... "That a proposed new nighttime operation or change in frequency of any existing nighttime operation (except Class IV stations) would (i) not cause objectionable interference to any existing station (see §73.182(o); and (ii) provide a first primary AM service to at least 25 percent of the area within the proposed interference-free nighttime service area or at least 25 percent of the population residing therein."



BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA. CIRCUIT

RECEIVED

NOV 30 1970

No. 24,379

CLERK OF THE UNITED
STATES COURT OF APPEALS

KOWL, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

EMERALD BROADCASTING COMPANY,
Intervenor.

ON APPEAL FROM A MEMORANDUM OPINION AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

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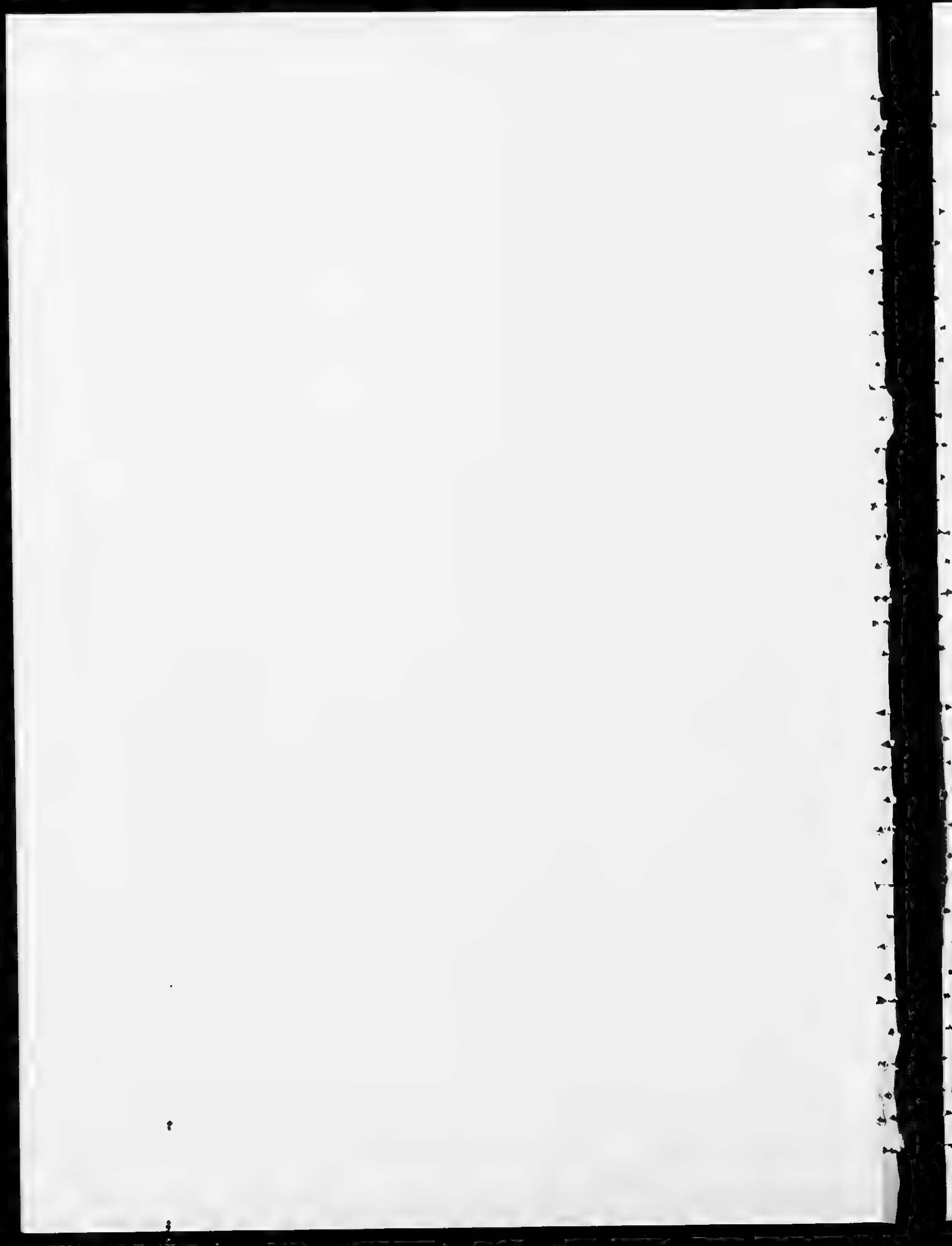


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*Cases, and other authorities principally relied upon are
marked with an asterisk.

IN THE UNITED STATES COURT OF APPEALS
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No. 24,379

KOWL, INC.,
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v.

FEDERAL COMMUNICATIONS COMMISSION,
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EMERALD BROADCASTING COMPANY,
Intervenor.

ON APPEAL FROM A MEMORANDUM OPINION AND ORDER
• OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLEE

ISSUE PRESENTED*

Whether the Federal Communications Commission acted either arbitrarily, capriciously or unreasonably in granting Emerald Broadcasting Company's (KTHO) application to operate its present radio station at night and in denying KOWL, Inc.'s petition to deny, without designating KTHO's application for hearing.

* This case has not previously been before this Court.

COUNTERSTATEMENT OF THE CASE

This appeal contests the Commission's action of May 20, 1970, granting the application of intervenor Emerald Broadcasting Company (KTHO) to operate its radio station at night in the South Lake Tahoe area, and denying appellant KOWL, Inc.'s petition to deny KTHO's application or, in the alternative, to designate the application for an evidentiary hearing. (J.A. 1-6). Exclusive appellate jurisdiction is conferred on this Court. 47 U.S.C. 402(b).

KTHO is presently a daytime only standard broadcast (AM) station operating in the South Lake Tahoe area. KOWL operates a standard broadcast station both during the day and at night in the same community. In 1965, KTHO tried unsuccessfully to obtain authority to operate at night. KOWL opposed that application, and the Commission denied nighttime authority because KTHO's engineering data failed to establish that it would serve a "white area"^{1/} which did not receive primary service from other AM stations. Emerald Broadcasting Co. (KTHO), 8 F.C.C. 2d 443 (1967).

^{1/} A "white area" is a region which presently has no nighttime AM radio service. See 560 Broadcast Corporation v. F.C.C., 135 U.S. App. D.C. 330, 331, 418 F.2d 1166, 1167 (1969).

Subsequently, KTHO established through engineering studies that it would serve a "white area," and on October 17, 1967, it reinstituted its application for nighttime operations. KOWL renewed its opposition to KTHO's application on the grounds that economic injury which it would suffer from a grant of KTHO's application would seriously jeopardize KOWL's public service; and that KTHO was not financially qualified, failed to ascertain the community's needs, and misrepresented the facts regarding its community contacts.

On several occasions the Commission staff which processed the application requested additional information regarding KTHO's efforts to ascertain community needs in the light of Commission clarification of its requirements in this area. (J.A. 105, 148). Appellant KOWL was also afforded an opportunity to further support its claim of economic injury, which it apparently abandoned. (J.A. 100).

In its Memorandum Opinion and Order adopted May 20, 1970, 23 F.C.C. 2d 178 (1970), the Commission concluded that there were "no substantial or material questions of fact which warrant designating [KTHO's] application for hearing; that [KTHO] is qualified to construct and operate as proposed; and that a grant of the application is in the public interest." (J.A. 6).

There was no dispute that the public interest would be served to the extent that KTHO would (1) serve a 60% "white area" at night and (2) establish a second competing AM station at night. Turning to KOWL's allegations the Commission, first, observed that KOWL, against whom KTHO would compete at night, had not attempted to support its allegation that the South Lake Tahoe community could not support two fulltime AM stations, with the specific type of data required to designate the matter for a formal hearing. (J.A. 2-3). Second, the Commission found that KTHO's cost and expense estimates were reasonable and had a basis in fact, KOWL having failed to allege anything to the contrary, and that KTHO had more than adequate funding available to it to show a reasonable likelihood of continued operation for at least the first year. (J.A. 3-4).

With respect to KOWL's allegations that KTHO had not complied with the Commission's ascertainment of community problem requirements, the Commission found that in its "total efforts," KTHO "satisfactorily" complied with the Commission's requirements thereby obviating any need for an evidentiary hearing on the matter. It also found that KTHO had acted in "good faith" in preparing and presenting various pleadings and exhibits pertaining to its ascertainment obligations, and that some of those submissions contained deficiencies demonstrating carelessness rather than bad character. (J.A. 4-5).

The Commission summed up its conclusion on this point as follows (J.A. 5-6):

It is clear that some of the applicant's past efforts with respect to ascertaining community needs are patently defective and others are of questionable merit. However, a review of the applicant's total efforts, including its most recently submitted amendment, convinces us that the applicant has made a good-faith effort to ascertain the problems and needs of its area and that this effort satisfactorily complies with our requirements. We conclude, therefore, that no purpose would be served by conducting further inquiry with respect to this showing and that the specification of a Suburban issue is not warranted. [2/]

In view of the foregoing, the Commission finds that there are no substantial or material questions of fact which warrant designating this application for hearing; that the applicant is qualified to construct and operate as proposed; and that a grant of the application is in the public interest.

Appellant KOWL did not exercise its right to seek reconsideration, 47 U.S.C. 405, even though it now claims that the Commission failed to resolve substantial factual disputes raised in its many pleadings opposing a grant of the application.

2/ Suburban Broadcasters, 30 F.C.C. 1021 (1961), aff'd sub nom. Henry v. F.C.C., 112 U.S. App. D.C. 257, 302 F.2d 191, cert. den. 371 U.S. 821 (1962), which set forth requirements that an applicant for a construction permit must take steps to familiarize himself with the needs and interests of the community and propose programming which would be expected to meet such needs and interests.

ARGUMENT

The application of intervenor KTHO to operate its present radio station at night would bring the first AM radio service to 60% of its area. Providing service to persons in such "white area" is the first objective of the Commission's radio allocations scheme. See NBC v. F.C.C., 124 U.S. App. D.C. 116, 119-120, 362 F.2d 946, 949-950 (1966). A grant of KTHO's application would also lead to the establishment of a second competing AM radio station at night in the South Lake Tahoe community. Establishment of a second local outlet is another important public allocations objective. See Notice of Proposed Rule Making (AM), 19 F.C.C. 2d 472, 480 (1969). The Commission has indicated that a second station in a community satisfies the following needs: "The listener's opportunity to select among locally originated programs; the availability to civic authorities, public service organizations, and advertisers of more than one local radio medium; and the stimulus of competition in local radio operations--these are among the conspicuous needs which remain unsatisfied in sizable one-station communities." Vermillion Broadcasting Co., 7 Pike & Fischer, R.R. 602 b (1953).

Appellant KOWL presently operates an AM radio station both during the day and at night in South Lake Tahoe. Before the Commission it alleged that establishment of KTHO's nighttime operation would adversely affect the paramount public interest. See Carroll Broadcasting Co. v. F.C.C., 103 U.S. App. D.C. 344, 258 F.2d 440 (1958). Both this Court and the Commission have recognized, however, that the Carroll case imposes a heavy burden on an existing station making such an allegation, and Southwestern Operating Co. v. F.C.C., 122 U.S. App. D.C. 137, 138, 351 F.2d 834, 835 (1965), indicated that "indeed, the temptation to an existing station to postpone as long as possible the advent of competition warrants special care by the Commission in the scrutiny of requests for hearing in Carroll circumstances." Appellant KOWL failed to submit the required information before the Commission and has now apparently abandoned the Carroll issue. (J.A. 100). Before this Court appellant does contend that the Commission erred in resolving, without a hearing, other issues raised in its petition to deny filed pursuant to Section 309 of the Communications Act, 47 U.S.C. 309.

We shall show that contrary to appellant's contention:

I. KTHO made reasonable and good faith efforts to ascertain the needs and interests of the South Lake Tahoe community, the area to be served, and proposed programming designed to meet those needs and interests. II. Although KTHO may initially have been careless in the preparation of some of its programming showing, it did not intentionally misrepresent any facts or lack candor so as to cast doubt on its character qualifications. III. There is a reasonable likelihood that KTHO will be financially able to construct and operate the proposed nighttime facilities.

Finally, as we develop the three points, it will become clear that the Commission in its six-page Memorandum Opinion and Order, did "issue a concise statement of the reasons" why it was denying KOWL's petition as required by Section 309(d) (2), 47 U.S.C. 309(d) (2); properly treated this case as one which did not necessitate costly and protracted hearings, but rather could adequately be resolved on the pleadings alone, Stanley Marsh, et al. v. F.C.C., ___ U.S. App. D.C. ___, ___ F.2d ___ (Case No. 23,224, August 7, 1970); and that "the path which it [the Commission] followed can be discerned." Pikes Peak Broadcasting Co. v. F.C.C., ___ U.S. App. D.C. ___, 422 F.2d 671, cert. denied, 395 U.S. 979 (1969), citing Colorado Interstate Co. v. FPC, 324 U.S. 581, 595 (1945).

I. KTHO SATISFACTORILY COMPLIED WITH THE
COMMISSION'S REQUIREMENTS RELATING TO
THE ASCERTAINMENT OF COMMUNITY INTERESTS,
NEEDS, AND TASTES.

Although some of KTHO's initial efforts with respect to the ascertainment of community needs and problems were "patently defective" and of "questionable merit," the Commission found that overall KTHO's total showing demonstrated "a good faith effort" to ascertain the problems and needs of the area it proposed to serve. These efforts "satisfactorily [complied] with the Commission's requirements." (J.A. 5). The Commission, in its Memorandum Opinion and Order, considered the various submissions of KTHO, in light of KOWL's allegations, before concluding that no useful purpose would be served by conducting further inquiry and that specification of a Suburban issue was not warranted. (J.A. 5).

A review of KTHO's entire showing demonstrated to the Commission the manner in which it proposes to meet the needs and interests of the community with sufficient clarity and specificity to provide a reasonable basis for a judgment

that it has complied with the Suburban policy. There is no doubt that "the principal ingredient of the licensee's obligation to operate his station in the public interest is the diligent, positive and continuing effort by the licensee to discover and fulfill the tastes, needs and desires of his community or service area, for broadcast service." Report and Statement of Policy Re: Commission En Banc Programming Inquiry, 25 F.R. 7291, 20 Pike & Fischer, R.R. 1901, 1915 (1960).

As specifically enumerated in Minshall Broadcasting Co., Inc., 11 F.C.C. 2d 796 (1968), which was released after KTHO had filed its application, an applicant is required to provide information (1) as to the steps taken to be informed of the real needs and interests of the area to be served, (2) as to the suggestions received, (3) as to the applicant's evaluation of those suggestions, and (4) as to the programming proposed to meet those needs.^{3/} We shall show that KTHO satisfactorily complied with these requirements.

3/ Minshall did not establish new Commission policy; it did restate and clarify the Commission's views regarding the showing required by the Suburban policy. See Sioux Empire Broadcasting Co., Inc., 11 F.C.C. 2d 995, at 998 (1969).

A. Steps Taken To Become Informed Of The Real
Community Needs And Interests Of The Area
To Be Served.

Since filing its application on October 17, 1967, KTHO has been in constant contact by means of telephone, mail, formal and informal meetings, and petitions with a cross-section of the South Lake Tahoe area, the community to be served. Exhibit 1 submitted in response to the programming portion of the application pertaining to the "ascertainment of program needs" sets forth 89 "representative groups, interests and organizations" which KTHO consults by telephone and by mail "on a continuing basis."^{4/} The Commission processing staff recognizing, as did KOWL (Br. 33), that KTHO had failed to show "what suggestions were received from which individuals as regards the needs of the South Lake Tahoe community," (emphasis supplied), wrote KTHO on April 14, 1969, enclosing a copy of a Public Notice on Ascertainment of Community Needs by Broadcast Applicants, 33 Fed. Reg. 12113, 13 Pike & Fischer, R.R. 2d 1903 (1968), which emphasized the four requirements set out in Minshall (J.A.105). Promptly on April 28, 1969, KTHO amended its application by listing specific persons contacted, their positions in the community, and their specific suggestions of the needs of the community.

^{4/} This listing included educational, religious, eleemosynary, and special civic organizations, together with business leaders and state and local government officials.

In light of a subsequent Commission discussion of an applicant's duty to ascertain the needs and interests of the community, the staff sent KTHO a copy of the new proposed Primer on Ascertainment of Community Problems by Broadcast Applicants, 20 F.C.C. 2d 880 (1970), inviting it to compare its efforts with the criteria in the Proposed Primer. In so doing, KTHO filed a further amendment on April 9, 1970, listing 52 individuals contacted, their occupations and interests and their specific suggestions. The suggestions, as conceded by KOWL (Br. 38), include problems common to most American communities, as well as some which have special relevance to South Lake Tahoe, the area to be served. The survey was the result of a review of the make-up of the community. Thirty-one persons contacted were regarded by the applicant as community leaders. The remainder represented a cross-section of the community. KTHO indicated that each person was personally contacted by a station employee or officer. Contrary to Port Jervis Broadcasting Co., Inc., 16 F.C.C. 2d 601 (1969), on which appellant relies (Br. 35), KTHO's surveys yielded more than mere expressions confirming a need for new nighttime facilities. Moreover, KTHO, in its amendment, detailed the nature of the conversations with persons contacted.

It is readily apparent that KTHO, in supplying the Commission with all information requested, took diligent and far-reaching steps to become informed of the real needs of the community and its interests. Moreover, as appellant acknowledges (Br. 36), the survey as set forth in the April, 1970 amendment represents a realistic and representative cross-section of the community.

B. Suggestions Received As To How The Station Could Help Meet The Areas's Needs And Evaluation Of Those Suggestions.

In its original application, KTHO detailed the "significant needs and interests of the public" which the applicant believes his station will serve. (J.A. 30). These included:

1. Weather, road and ski conditions.
2. Articulation of the many problems resulting from the establishment of a new incorporated city.
3. News of the major business of the area-tourism.
4. General local news and information.

Later KTHO, in its April 28, 1969 amendment and in its April 9, 1970 amendment, identified those needs as well as others. Hence, it is clear that KTHO sought and identified specific community needs and interests.

The identification of specific needs previously mentioned does demonstrate that KTHO did make the necessary evaluation of the relative importance of the suggestions. Moreover, the Commission does not require that an applicant list all suggestions received, picking the most significant, and explaining why others not chosen are deemed insignificant. Sioux Empire Broadcasting Co., 16 F.C.C. 2d 995, 998, n. 4 (1969).^{5/}

C. Proposed Programming Designed To Meet These Needs As KTHO Has Evaluated Them.

In its October 17, 1967, application, KTHO had set out the specific types of programs which it proposed to broadcast with a view toward fulfilling the needs of the community. (J.A. 31). Each of the proposed program titles was followed by a brief, but informative, description of the type of programming, the frequency of broadcasts, and duration. KTHO proposed to devote 21% of broadcast time to programs, other than entertainment and sports. It also proposed a minimum of 300 public service announcements during a typical week.

^{5/} In this regard the Commission has observed that

While Minshall originally required the application to disclose the applicant's evaluation of the suggestions received, we subsequently determined that such a specific showing was not necessarily required for our consideration of the application. Thus, the public notice merely indicates that the application is expected, at least subjectively, to evaluate the relative importance of the suggestions and to consider them in formulating the program proposal, even though a specific showing of such evaluation is no longer required in the application.

16 F.C.C. 2d at 998, n. 4.

In its August 25, 1968, amendment to its application, KTHO set forth its "service philosophy and programming." It identified specific needs of the community and how KTHO is planning to respond to them, e.g., initiation of mobile unit news, special events reports and continuance of a "unique program" called "Dateline Tahoe."^{6/}

As previously mentioned appellant KOWL all but concedes that KTHO has ascertained the needs of the community, but it does suggest (Br. 38-40) that KTHO's proposal to devote 21% of its broadcast week to programs, other than sports and entertainment, may not be sufficient to meet the needs and interests of the community. At the present time the Commission still "does not prescribe any percentages of time which should be devoted to particular subjects, such as news, education, religion, public issues, music, etc." 25 F.C.C. Ann. Rep. 49-50 (1959). Two Commissioners have suggested a standard of at least 5% news, 1% public affairs, and 5% all other programs (religious, instructional, educational). Indiana, Kentucky, and Tennessee Renewals, dissenting opinion of Commissioner Johnson, FCC Mimeo No. 54690, September 17, 1970.

^{6/} In Exhibit 3 of its application (J.A. 31), KTHO had stated that it would give "expanded exposure" to specified programs as a result of nighttime operation. Moreover, the inherent flexibility in the proposed programming schedule allows other needs to be covered as they gain in relative importance, e.g., lack of community identity, geographic secularism, outmoded tax base, lack of a state college, defective highways, lack of employment opportunity, etc.

KTHO's proposals in the application filed October 17, 1967, substantially exceed these suggestions:

	<u>Hours</u>	<u>Minutes</u>	<u>% of Total Time on Air</u>
News	22	13	13.7
Public Affairs	2	23	1.5
Other	9	28	5.8
			<u>21.0%</u>

There is thus little merit to KOWL's suggestion that KTHO will not be able to serve the community's needs with these proposed programming percentages.^{7/} And we will show in the next part of our Brief that KTHO did not misrepresent facts to the Commission in making its programming showing.

^{7/} Interestingly enough, appellant KOWL, which is already operating in the same community both during the day and at night, in a November 14, 1968, amendment to its most recent license renewal application proposed the following;

	<u>Hours</u>	<u>Minutes</u>	<u>% of Total Time on Air</u>
News	21	-	13.0
Public Affairs	-	56	.6
Other	6	30	4.0
			<u>17.6%</u>

Its past programming percentages were even less: 12.8% news, 0.6% public affairs, and 2.6% others, for a total of 16%. (See Appendix to this Brief.)

II. THE ALLEGATIONS OF APPELLANT KOWL FAILED TO
RAISE ANY SUBSTANTIAL OR MATERIAL QUESTIONS
OF FACT REQUIRING A HEARING REGARDING KTHO'S
CHARACTER QUALIFICATIONS.

Appellant KOWL argues that KTHO, in submitting various pleadings and exhibits to the Commission demonstrating its efforts to ascertain the needs and interests of the South Lake Tahoe community, showed a lack of candor, a willingness to deceive, an attempt to deliberately misrepresent the facts, and outright carelessness. (Br. 16-28). KOWL further contends that the Commission acted arbitrarily and capriciously by failing either to set forth its findings of good character and reasons therefor with convincing clarity and precision in its Order or, in the alternative, to designate a character issue for formal hearing. (Br. 28-30). We shall show that appellant's allegations simply failed to raise any substantial questions about KTHO's character qualifications.

Before the Commission may grant an application for a license modification, it must be satisfied that the applicant has the requisite character qualifications. 47 U.S.C. 308(b); F.C.C. v. WOKO, Inc., 329 U.S. 223, 229 (1946). The Supreme

Court has held that it is the Commission, not the courts, that must be satisfied that the applicant will operate in the public interest. F.C.C. v. WOKO, Inc., supra, 329 U.S. at 229. Similarly, this Court has indicated that all questions bearing on an applicant's character qualifications, such as questions respecting misrepresentations, are fact questions peculiarly within the province and expertise of the Commission to consider and resolve. WEBR, Inc. v. F.C.C., 136 U.S. App. D.C. 316, 322, 420 F.2d 158, 164 (1969). It is only fair that the Commission distinguish between cases involving "slight inadvertence" in reporting and those revealing deliberate deception. F.C.C. v. WOKO, Inc., supra, 329 U.S. at 228.

It is clear from the Commission's Order that the Commission was cognizant of the character qualifications raised by KOWL and upon the record before it resolved the question in favor of KTHO. (J.A. 4-6). The Commission found and expressly stated that KTHO "is qualified to construct and operate as proposed; and that a grant of the application is in the public interest." (J.A. 6). This was preceded by the finding that in the light shed by Minshall and the Proposed Primer, (pp. 9-16, supra), KTHO's "total efforts" revealed a "good faith effort to ascertain the needs and problems of the community" and that these efforts "satisfactorily" complied with the Commission's Suburban requirements.

For the purposes of clarity, we shall treat KOWL's misrepresentation charges in the order in which they appear in appellant's brief. We shall show that KOWL's allegations regarding (1) the 865 signatures (Br. 16-21), (2) the November 1968 Amendment (Br. 21-24), and (3) the affidavits from community leaders (Br. 24-27) show only isolated instances of carelessness on the part of KTHO and did not lead to the unavoidable inference that KTHO misrepresented the facts and therefore lacked character.

1. The 865 Signatures. One of KTHO's pleadings made reference to a set of signature petitions previously filed with the Commission. KOWL, as it did in its pleadings, points out various deficiencies in the petition, i.e., 80 signatures of the 865 gathered were from children, 22 evidenced double signing, 23 lacked addresses, and 5 were "disavowed." KOWL also questions the manner in which KTHO deposited, unsupervised, some of the petitions, some without headings, in supermarkets and stores. However, while these matters relate to the thoroughness and care with which KTHO pursued its community ascertainment obligations, as we will show, none of them justifies the charge that KTHO was attempting to deceive the Commission.

First, KTHO made no claim that children were not solicited or that they had not signed the petitions. KTHO stated (J.A. 7) that the petitions represented expressions from "[m]embers of the public." It accurately stated that one out of every 31 persons, according to population statistics, signed the petition. With regard to the 11% figure, KTHO merely assumed that "each signer represents four persons in a household." (J.A. 7-8). KTHO did not claim that each signator was a head of household or that each signator had actual authority to stipulate the wishes of three other persons. It only conjectured that if there were, on the average, four persons in every household, and every person comes from one of those households, 11% of the population "has gone on record as demanding fulltime service. . . ." (J.A. 8). All that can be said is that KTHO may have been wrong in the statistical assumptions it made but it does not follow that KTHO attempted to deceive the Commission.

Second, KTHO set out in detail the various regions represented by the signators and the number of persons therefrom. (J.A. 8). However, KTHO did not claim, as KOWL suggests, that the signators were all permanent residents of the community. That eleven of 865 signators were "out of towners" is not surprising in a community which attracts many tourists.

Third, the lack of addresses for some of the signators goes to the issue of how much weight should be given to the petitions. So also the matter of doubling signings. The case might have been different had KTHO not submitted copies of the petitions with its pleadings. The signature petitions were submitted to the Commission, and these defects were readily apparent to its experienced processing staff, which on several occasions requested additional information.

Fourth, with respect to the manner in which the petitions were gathered, there is no rule prohibiting an applicant from leaving lists unsupervised in supermarkets and stores. KTHO did not claim, either expressly or impliedly, that the lists were marshaled under strict scientific survey techniques, and the Commission has not yet required rigid scientific accuracy.

2. The November 1968 Amendment. This amendment to the original application contained 200 additional signatures on "public petitions for grant of fulltime operating authority," (J.A. 71), and "forty-two different detailed letters from members

of the public." As "evidence of outright misrepresentation" (Br. 21), KOWL observes that 11 of the 42 letter writers also signed the public petitions. KOWL's premise from which it infers misrepresentation is fallacious. It is more reasonable to read the phrase as meaning that the 42 letters were signed by "different" individuals than to read it, as does KOWL, to mean that the 42 individuals who signed the letters were "different" from the 200 individuals who signed the petitions.

As additional clear evidence of misrepresentation, appellant observes that sprinkled among the 200 signators were three persons in a local advertising agency doing business with KTHO's station and six of the station's employees. We respectfully submit that only a business competitor, who is very concerned about new competition, would seriously suggest that these circumstances are "clear evidence of outright misrepresentation" requiring resolution in a lengthy evidentiary hearing.

3. Community Leaders. In its April 28, 1969 amendment to its original application, KTHO submitted lists of persons contacted and related community needs. (J.A. 106-110). KOWL submitted affidavits from five men allegedly contacted denying contacts of the type which KTHO described. (J.A. 126-129).

Specifically, KTHO stated that its representatives "have been in communication in recent months with Anthony Magliari" (J.A. 112), the school superintendent, and that there had been "public criticism" over the closing of the Meyers Elementary School. (J.A. 116). Significantly, Magliari, in an affidavit filed by KOWL, does not deny that he was ever contacted by KTHO. He disagreed with the station that there was "public criticism" over the closing of the school. KTHO did not attribute the statement directly to Magliari but concluded this on its own. It is difficult to fault KTHO on such a subjective news evaluation since there may be sections of the community which did not favor the closing. Moreover, Mr. Magliari clearly supported KTHO's proposal since he not only signed the public petitions, but also wrote one of the letters (See KOWL's Br. 22).

KTHO stated that Messrs. John Williams and Walt Little "have been contacted in recent months" by KTHO in connection with "the severe problems of providing adequate nighttime recreation facilities for youth." Although Little denied that he met with KTHO "officials" on this particular point, he did not deny that KTHO contacted him, and he admitted working with an official of KTHO on the subject of supplying recreation outlets for youth. Williams later repudiated (J.A. 137) the statement on which appellant KOWL relied so that no substantial question was raised by the earlier statement submitted by KOWL.

Finally, with respect to the contacts by KTHO with Messrs. Granotti and Geach, the affiants merely disputed the nature of the contacts; they did not deny that they met at public meetings or elsewhere where KTHO was represented. KOWL argues that these discrepancies show "passive participation in distant meetings" which do not comply with the Commission's requirements. (Br. 27). But as we have previously shown, pp. 9-16, supra, fifty-two additional individuals were also surveyed by KTHO, and its total efforts did establish compliance with the Suburban requirements. (J.A. 5).

The Commission in its review of KOWL's allegations and KTHO's responses found that some of the applicant's efforts were "patently defective" and others were of "questionable merit;" however, these errors did not raise any question about the applicant's "good faith" which might reflect on character and warrant an evidentiary hearing. "Contradictory allegations and affidavits which create some possibly unresolved factual issue do not invariably necessitate an evidentiary hearing . . . "

Broadcast Enterprises, Inc. v. F.C.C., 129 U.S. App. D.C. 68, 70, 390 F.2d 483, 485 (1968). After considering the allegations in appellant KOWL's pleadings, together with the applicant's entire Suburban showing, the Commission could reasonably conclude that the

public would be served by a grant without hearing. "Only where the public interest cannot be determined without a resolution of disputed facts has Congress dictated that the Commission must conduct a hearing." Stanley Marsh et al. v. F.C.C., supra (Case No. 23,224, August 7, 1970, S.O. p. 9).

III. THERE IS A REASONABLE LIKELIHOOD THAT KTHO WILL BE ABLE TO CONSTRUCT AND OPERATE AS PROPOSED AND KOWL FAILED TO RAISE ANY SUBSTANTIAL QUESTION REQUIRING A HEARING ON A FINANCIAL ISSUE.

As a practical matter, on the financial qualifications issue it should be noted at the outset that (1) KTHO has operated its daytime facilities since 1963; that (2) appellant KOWL "did not question KTHO's financial capacity to put the nighttime facilities into operation" (Br. 40); and that (3) appellant has abandoned its claim that the community cannot support two stations at night. Nevertheless it continues to insist before this Court that the Commission committed reversible error in finding the applicant financially qualified without making further inquiry, preferably in an evidentiary hearing. We will show that there is no merit to appellant's argument.

On the financial qualification question the Commission seeks to ascertain whether there exists a "reasonable likelihood" that a grant of the application for a modified construction permit will result in a "continuing" operation for at least the first year, Ultravision Broadcasting Company, 1 F.C.C. 2d 544 (1965).^{8/} An applicant must show that it has funds available to it (committed and/or expected revenues) which are equal to or greater than the total costs estimated for construction and first-year operation of the proposed facility. The Commission approaches questions about financial qualifications with a realistic eye strengthened by a great many years of experience gained from individual license actions and from its annual preparation of statistics regarding broadcast financial data for AM-FM stations. See e.g., 35 FCC Ann. Rep., pp. 145-177 (1969).

^{8/} The stricter tests of Ultravision, which KOWL contends KTHO failed to meet, have been regarded by the Commission as "not necessarily applying" to applications by existing stations for modification of their facilities unless the station relies, in whole or in part, on an expected increase in broadcast revenues. Under such a circumstance, its estimates of revenues and expenses become an important factor to be considered, Desert Telecasting Co., Inc., 2 F.C.C. 2d 217, 219 (1965).

In its Order the Commission observed that although appellant KOWL "concedes that sufficient funds appear available to meet construction costs, it attacks KTHO's projected estimate of revenues (\$105,000) and expenses (\$90,000) for the first year. It is alleged that no supporting data for these estimates are given. KTHO responds that the revenue and expense estimates are based on KTHO's actual operating experience in the market." (J.A. 3).

The Commission first determined whether the estimates were reasonable. Since KTHO's estimates were based on its actual operating experience in the community and the figures did not appear to be unreasonably low, the Commission concluded that the estimates were reasonable and not contradicted by the facts reported in KTHO's annual financial reports for the years 1967-1969.^{9/} (J.A. 3).

^{9/} Appellant KOWL claims that it was not permitted to see these annual financial reports. The short answer is that this contention was not advanced before the Commission as is required by Section 405 of the Communications Act and therefore cannot be advanced for the first time on appeal. W.H. Hansen v. F.C.C., U.S. App. D.C. ___, 413 F.2d 374, 376 (1969).

Appellant's reliance on the action of the Executive Director pursuant to delegated authority, 24 F.C.C. 2d 305 (1970), is misplaced since appellant did not file an application for review with the Commission and the filing of an application for review "is a condition precedent to judicial review" of any action taken pursuant to delegated authority. 47 U.S.C. 155 (d) (7).

In the face of the Commission's finding, KOWL merely continues to assert that the estimates "were unsupported." It should be noted that KOWL has had considerable experience with a fulltime AM station in the community. It had at its disposal a wealth of personal experience with respect to operating expenses and revenues. Although KOWL was in an excellent position to demonstrate a disparity between its own actual experience and the estimates of KTHO, it did not do so.

Having found that KTHO's cost estimates were reasonable, the Commission then sought to determine whether KTHO possessed sufficient funds to meet the \$90,000 expenses. KTHO did not rely on expected revenues. Messrs. Robert W. Breckner and Donald C. McBain, principals of KTHO, had submitted written assurances of their intention to invest all moneys necessary to construct and operate KTHO fulltime. (J.A. 33). In its pleadings, KOWL raised a number of questions about the financial ability of the two principals which were disposed of

^{10/}
in the Commission's Order.

The Commission has in the past relied on the net worth of those persons financing an application. See Springfield Television Broadcasting Corp., 2 Pike & Fischer, R.R. 2d 843 (1964). An analysis of the principals' 1968 financial statements (J.A.67-68) indicated that their combined net worth (assets less liabilities) was in excess of \$675,000 or at least six times the amount needed to support the new facility for a year

^{10/} The Commission observed that KOWL claimed that the two principals were

overburdened financially with their commitments to Crown City Broadcasting Co., one of the 10 applicants in hearing for the facilities of station KRLA, Pasadena, Calif. It is alleged, without supporting data, that Messrs. Breckner and McBain have a financial commitment of \$70,000 apiece in this proceeding. In a narrative report, filed November 9, 1965, and in an amended financial statement, filed August 26, 1968, Mr. McBain alleged that in the event Crown City Broadcasting Co. (Crown City) is the successful applicant for the facilities of KRLA, he is committed to provide \$53,000, none of which is attributable to his personal assets. Mr. McBain has reached an agreement with Santa Monica Bank whereby the bank will provide the requisite funds. Mr. Breckner has agreed to pledge sufficient amounts of listed stocks to Santa Monica Bank as a guarantee for Mr. McBain's loan, and Mr. McBain has agreed to pledge Mr. Breckner his stock in Crown City as collateral for this guarantee. Mr. Breckner's commitment to Crown City is allegedly less than \$53,000, all of which is to be provided from his personal assets. Financial statements filed by Mr. Breckner show sufficient assets to meet these commitments. Furthermore, both Mr. McBain and Mr. Breckner appear to have sufficient assets to meet their commitments to KTHO. In view of these factors, together with the apparent self-sufficiency of KTHO, we conclude that the designation of a financial issue is not warranted. (J.A. 3-4).

^{11/} without any revenues. This showed a "reasonable likelihood" of a continuing operation.

KOWL argues that the Commission failed to consider the recent stock market decline and the commitments of these principals to another pending application. First, assuming arguendo that the stock assets of KTHO's principals had been reduced to zero as a result of the recent stock market decline, the net worth after taxes would still be more than twice the amount needed to operate the station for at least the first year. Second, the Commission did treat at some length the argument that KTHO's principals were over-committed because of an application in another proceeding, so as to impair their solvency in this proceeding. Note 10, supra. KOWL did not contest the assertion by Mr. McBain that his \$53,000 commitment to the other proceeding would not be derived from his personal assets, and that Mr. Breckner's commitment which will be derived from his assets

^{11/} Although appellant KOWL now contends that the Commission's Order in this case differed from its subsequent action in Northwestern Communications Corp., 23 F.C.C. 2d 444 (1970), it never sought reconsideration of the present order in the light of the subsequent action, and therefore cannot advance this contention for the first time on appeal. 47 U.S.C. 405; Hansen v. F.C.C., note 9, supra.

is less than \$53,000. This does not reduce their combined net worth below the necessary amount needed to operate. It is clear that KOWL failed to raise any significant question of KTHO's financial qualifications. In view of the foregoing, the Commission properly denied KOWL's request that a financial issue be designated for hearing.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Commission's action granting KTHO's application for a modification of its construction permit, and denying KOWL's petition to deny, should be affirmed.

Respectfully submitted,

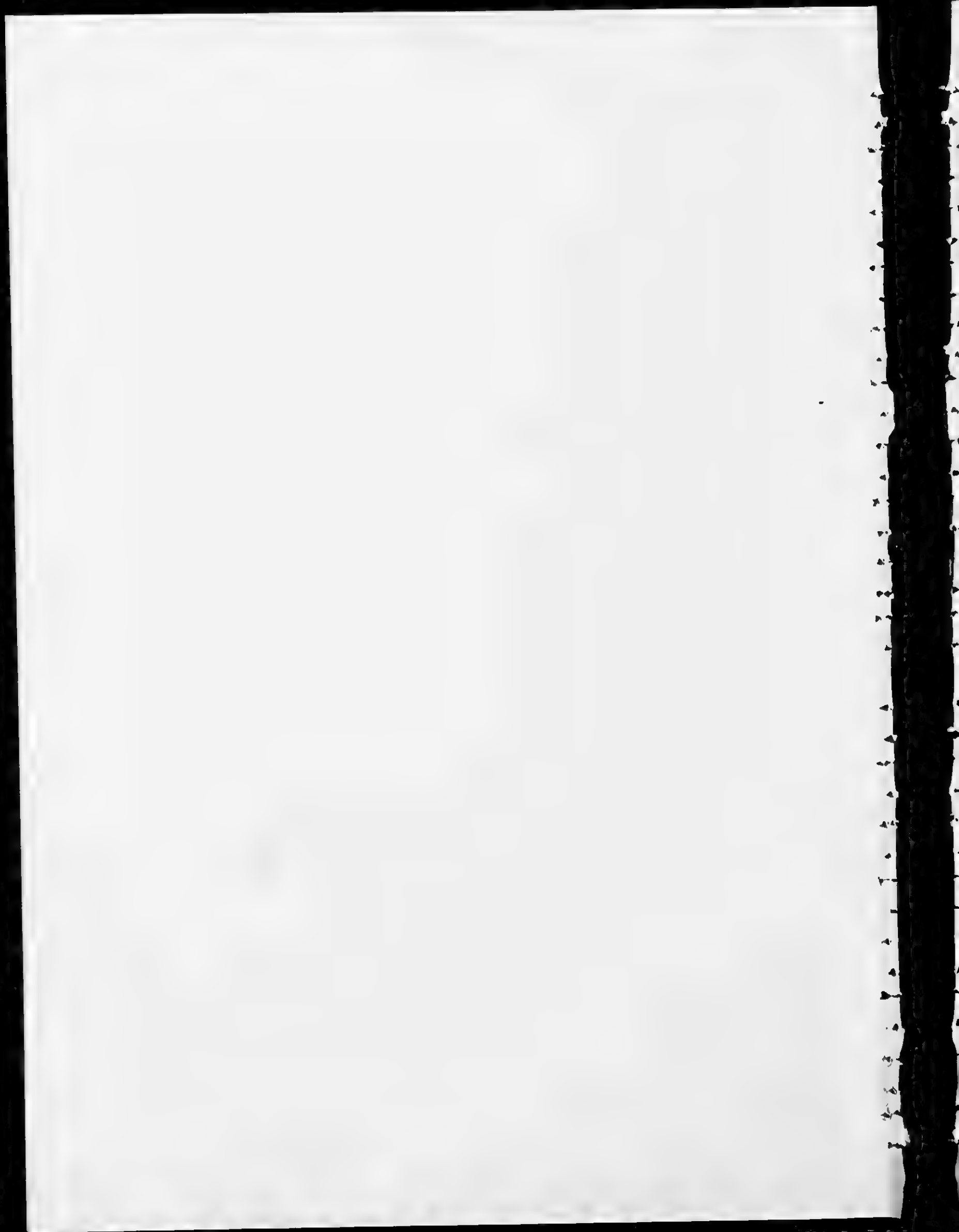
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RICHARD R. ZARAGOZA,
Counsel.

Federal Communications Commission
Washington, D. C. 20554

October 26, 1970.



FEDERAL COMMUNICATIONS COMMISSION

Section IV-A

STATEMENT OF AM OR FM
PROGRAM SERVICE
(See instructions, Sec. IV-A, pages 7 and 8.)

Name of Applicant

KOWL, Inc.

Call letters of station

City and state which station is licensed to serve

KOWL

South Lake Tahoe, California

PART I

Ascertainment of Program Needs

1. A. State in Exhibit No. _____ the methods used by the applicant to ascertain the needs and interests of the public served by the station. Such information shall include (1) identification of representative groups, interests and organizations which were consulted and (2) the major communities or areas which applicant principally undertakes to serve.
- B. Describe in Exhibit No. _____ the significant needs and interests of the public which the applicant believes his station will serve during the coming license period, including those with respect to national and international matters.
- C. List in Exhibit No. _____ typical and illustrative programs or program series (excluding Entertainment and News) that applicant plans to broadcast during the coming license period to meet those needs and interests.

NOTE: Sufficient records shall be kept on file at the station, open for inspection by the Commission, for a period of 3 years from the date of filing of this statement (unless requested to be kept longer by the Commission) to support the representations required in answer to Question 1. These records should not be submitted with this application and need not be available for public inspection.

PART II

Past Programming

2. A. State the total hours of operation during the composite week: 162
- B. Attach as Exhibit No. _____ one exact copy of the program logs for the composite week used as a basis for responding to questions herein. Applicants utilizing automatic program logging devices must comply with the provisions of Sections 73.112(c) and 73.282(c). Automatic recordings will be returned to the applicant. Exact copies will not be returned.
- If applicant has not operated during all of the days of the composite week which would be applicable to the use of this form, applicant should so notify the Commission and request the designation of substitute day or days as required.
3. A. State the amount of time (rounded to the nearest minute) the applicant devoted in the composite week to the program types (see Definitions) listed below. Commercial matter within a program segment shall be excluded in computing time devoted to that particular program segment (e.g., a 15-minute news program containing 3 minutes' commercial matter shall be counted as a 12-minute news program).

	Hours	Minutes	% of Total Time on Air
(1) News	20	42	12.8 %
(2) Public Affairs	-	56	.6 %
(3) All other programs, exclusive of Entertainment and Sports	4	10	2.6 %

- B. If in the applicant's judgment the composite week does not adequately represent the station's past programming, applicant may in addition provide in Exhibit No. _____ the same information as required in 3-A above (using the same format) for a calendar month or longer during the year preceding the filing of this application. Applicant shall identify the time period used. Applicant need not file the program logs used in responding to this question unless requested by the Commission.

4. List in Exhibit No. _____ typical and illustrative programs or program series (excluding Entertainment and News) broadcast during the year preceding the filing of this application which have served public needs and interests in applicant's judgment. Denote, by underlining the Title, those programs, if any, designed to inform the public on local, national or international problems of greatest public importance in the community served by the applicant. Use the format below.

Title	Source*	Type*	Brief Description	Time Broadcast & Duration	How Often Broadcast
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5. Submit in Exhibit No. _____ the following information concerning the applicant's news programs:
- A. The staff, news gathering facilities, news services and other sources utilized; and
- B. An estimate of the percentage of news program time devoted to local and regional news during the composite week.
6. In connection with the applicant's public affairs programming, describe its policy during the past renewal period with respect to making time available for the discussion of public issues and the method of selecting subjects and participants.

*See Definitions Section IV-A, Page 7

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STATEMENT OF AM OR FM PROGRAM SERVICE

Section IV-A, Page 2

7. Describe briefly the applicant's program format(s) during the past 12 months (e.g., country and western music, talk, folk music, classical music, foreign language, jazz, standard pops, etc.) and the approximate percentage of time per week devoted to such format(s).
8. State how and to what extent (if any) applicant's station contributed during the past license period to the over-all diversity of program services available in the area or communities served.
9. Was the applicant affiliated with one or more national, regional or special radio networks during the past license period?
Yes _____ No _____. If "yes," give name(s) of network(s): _____
10. State the number of public service announcements broadcast by the applicant during the composite week: _____
11. A. If this application is for an FM station, did the programming duplicate that of any AM station?
Yes _____ No _____. ("Duplicate" means simultaneous broadcasting of a particular program over both the AM and FM stations or the broadcast of a particular FM program within 24 hours before or after the identical program is broadcast over the AM station—Section 73.242(a) of the Rules and Regulations.)
B. If the answer is "yes," identify the AM station by call letters; describe its relation to the FM station; and state the number of hours each day in the composite week that were duplicated.
12. A. In applicant's judgment, does the information supplied in this Part II adequately reflect its past programming?
Yes _____ No _____.
B. If "no," applicant may attach as Exhibit No. _____ such additional information as may be necessary to describe accurately and present fairly its program service.
C. If applicant's programming practices for the period covered by this statement varied substantially from the programming representations made in applicant's last renewal application, the applicant shall submit as Exhibit No. _____ a statement explaining the variations and the reasons therefor.

PART III

Proposed Programming

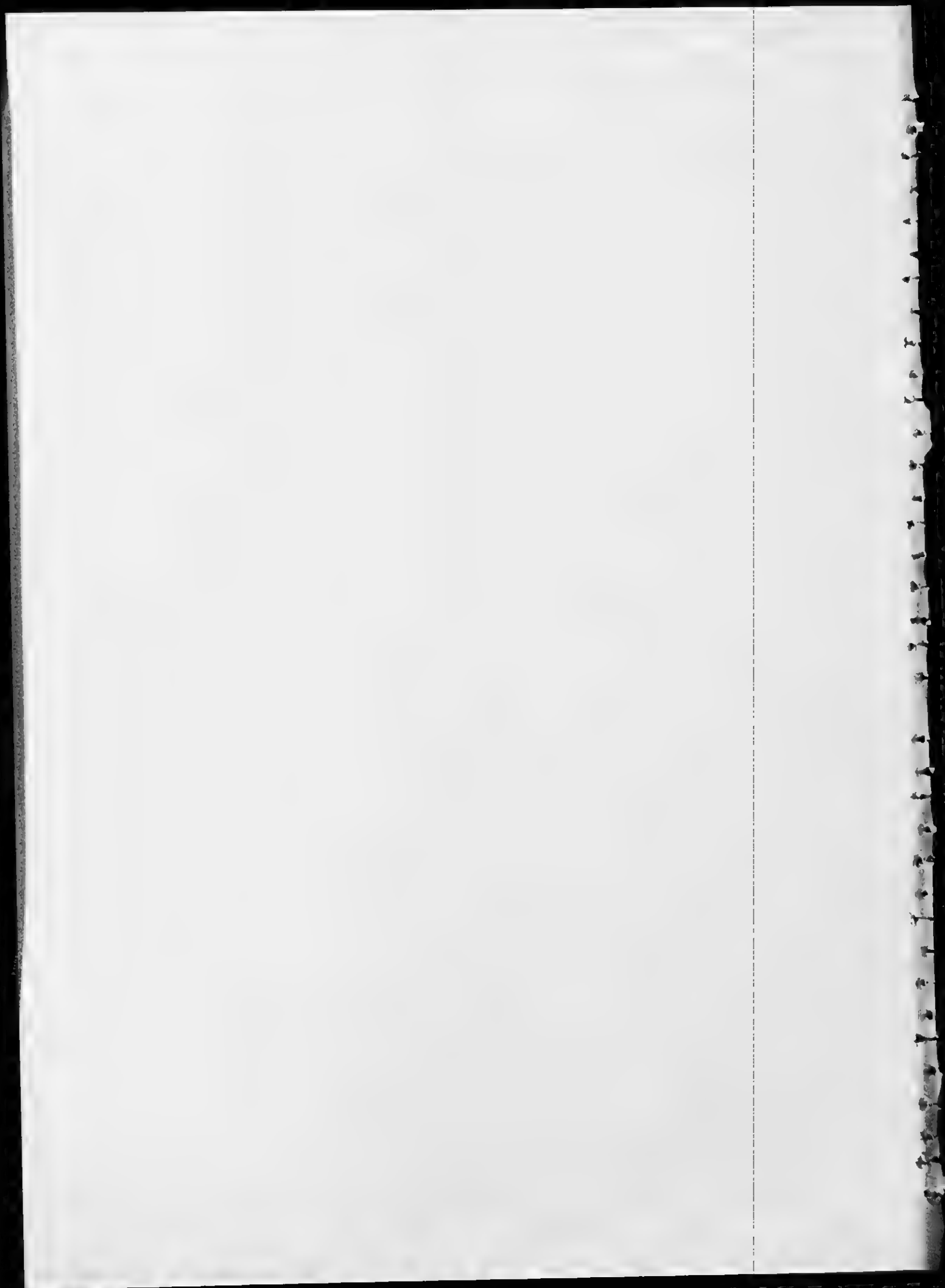
13. State the proposed total hours of operation during a typical week: 162
14. State the minimum amount of time the applicant proposes to devote normally each week to the program types (see Definitions) listed below. Commercial matter within a program segment shall be excluded in computing time devoted to that particular program segment. (e.g., a fifteen-minute news program containing 3 minutes' commercial matter shall be computed as a 12-minute news program.)

	<u>Hours</u>	<u>Minutes</u>	<u>% of Total Time on Air</u>	
(1) News	<u>21</u>	<u>-</u>	<u>13.0</u> %	See Ex. 2
(2) Public Affairs	<u>-</u>	<u>56</u>	<u>.6</u> %	
(3) All other programs, exclusive of Entertainment and Sports	<u>6</u>	<u>30</u>	<u>4.0</u> %	

15. Submit in Exhibit No. _____ the following information concerning the applicant's proposed news programs:
- A. The staff, news gathering facilities, news services and other sources to be utilized; and
- B. An estimate of the percentage of news program time to be devoted to local and regional news during a typical week.

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REPLY BRIEF FOR APPELLANT
KOWL, INC.

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,379

KOWL, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

EMERALD BROADCASTING COMPANY,

Intervenor
(KTHO).

On Appeal From a
Memorandum Opinion and Order of the
Federal Communications Commission

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 11 1970

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Attorneys for Appellant
KOWL, Inc.

November 9, 1970

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IN THE
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FEDERAL COMMUNICATIONS COMMISSION,

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EMERALD BROADCASTING COMPANY,

Intervenor
(KTHO).

On Appeal From a
Memorandum Opinion and Order of the
Federal Communications Commission

REPLY BRIEF FOR APPELLANT,
KOWL, INC.

PRELIMINARY STATEMENT

This appeal is brought to this Court by station KOWL, an economic competitor of KTHO. Below, KOWL pointed to the very real consequences it anticipated would follow an award of the full-time facilities at issue. Because

much has been made of this by KTHO here, certain facts will be set forth. KOWL is a Class IV standard broadcast (AM) station on 1490 kHz, and, as such, its facilities are limited to 1 kw daytime and .250 kw nighttime. KTHO is a Class III regional standard broadcast station on 590 kHz, with 1 kw daytime, and KTHO-FM is a full-time frequency modulation (FM) station operating fulltime. At stake here is KTHO's attempt to secure full-time AM to complement its full-time FM.

KOWL detailed before the Commission facts of its own operation and the cut-rate, market-destroying type of competition indulged by KTHO; however, KOWL did not cite to the *Carroll*¹ case or argue for an issue under *Carroll* before the Commission.²

The aspersions cast by KTHO in its Brief on this point arose in the following chronology, here outlined: KOWL petitioned against KTHO and pointed up the economic effects that would flow from a KTHO grant; those economic arguments notwithstanding, KTHO claimed KOWL had no standing; then, in a letter to the Commission dated November 26, 1968 (App. 97), KTHO mistakenly stated that KOWL had attempted to raise a *Carroll* issue. (The simple fact was that KOWL had not to that time even mentioned or cited to the *Carroll* case.) The Commission then cited *Carroll* to KOWL and indicated KOWL's renewal would be deferred; to that, KOWL responded it was not attempting to raise sufficient grounds upon which to request a *Carroll* issue (App. 100).³ No part of this appeal is predicated upon the *Carroll* issue.

This Reply Brief responds to the Briefs of both the Commission and Intervenor KTHO. In the main, the contentions of the Commission will be given

¹ *Carroll Broadcasting Company v. F.C.C.*, 103 U.S. App. D.C. 346, 258 F.2d 440 (1958).

² The Commission's recounting of some of the stringent pleading ingredients under *Carroll* (Order, para. 5; App. 2), indicates the utter difficulty of making such a showing.

³ The Commission's statement that KOWL was invited to support its economic argument (Bt., p. 3) is not supported by the record.

the more attention herein. It is noted, however, that in KTHO's fifty pages of rather unrestrained invective⁴ the bounds of propriety are not only exceeded, but the Commission is contradicted in several particulars. Moreover, by disdaining the use of record citations in many instances, KTHO has indulged in assertions of extra record "facts." Nothing in the opposing briefs, KOWL submits, effectively conceals the obvious: the Commission simply did not make findings to support its conclusions.

THE MATERIAL AND SUBSTANTIAL CHARACTER ALLEGATIONS REMAIN WITHOUT PROPER ANSWER

The Commission appears here — just as it did in *West Michigan Telecasters*⁵ — attempting to have the Court act in its stead as the fact finder. This would manifestly be improper. *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). If there were a rational basis for the Memorandum Opinion and Order (Order) appealed from (and KOWL submits there is not), it should have been enunciated below.

The Commission recognizes it is "only fair" that it distinguish between cases involving only "slight inadvertence" in reporting and attempts at "deliberate deception" (Br., p. 18). Then, in rapid fire conclusionary style it informs that KTHO was found to be only "careless" and that this was held not to lead to the "unavoidable inference" of misrepresentations evincing lack of character (Br., p. 19). However, the distinguishing finding of "carelessness" is nowhere made in the Order. Moreover, the apparent concession of *some* inference of character deficiency⁶ is not treated in the Order at all.

⁴ E.g., characterizations such as "frivolous," "fatuous," "snide," "whimsical," "palpably false," "delaying," "unscrupulous," "patently contrived," attempts to "confuse issues and impose delay," "fundamentally baseless" "for the purpose of delay and harassment," "frightened," "attempting to distort," "abusive distortion."

⁵ *West Michigan Telecasters, Inc. v. Federal Communications Commission*, 130 U.S. App. D.C. 39, 396 F.2d 688 (1968).

⁶ The articulation here of a not *unavoidable* inference, admits, at the least, of an *avoidable* inference. But the Order seems oblivious to it. Had the Commission attempted to

(cont'd)

The Supreme Court has spoken directly to the point:

"The administrative process will be vindicated by clarity in its exercise . . . [I]t will avoid needless litigation and make for effective and expeditious enforcement of the Board's order to require the Board to disclose the basis of its order" *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941).

KOWL detailed in its main Brief the abject failure of the Commission's Order to set forth the required findings of fact upon which disposition of the character allegations raised by KOWL were predicated. Now, however, under the scrutiny of judicial review, the Commission's General Counsel, attempting to persuade this Court that the disposition below was apt, finds it necessary to supply the missing findings of fact. The Brief's treatment of the character question, in fact, constitutes an admission that the Commission's Order was deficient in that respect.⁷

The Brief adroitly maneuvers to render *de minimus* the substantial allegations of misrepresentation by isolating and treating each of them apart from the others. This procedural technique is in violation of the Commission's "collective effect" doctrine enunciated in *The Walmac Co.*, 36 FCC 507, 2 RR 2d 145 (1964). There the Commission held that "isolating and evaluating each of the items in this fashion obscures and distorts the overall picture." 36 FCC at 509, 2 RR 2d at 147. Yet, even were such a procedural tactic deemed

⁶ (Cont'd) delve into the character allegations with its customary care, it would have found, KOWL submits, that the "character" facts alleged were, and are, material and substantial and largely unanswered.

⁷ Intervenor KTHO, for its part, pauses in its invective to undercut the Commission's careful strategy in this effort by asserting, in the main, that the KOWL sworn factual charges were "frivolous, vague or incidental" assertions to which no specific answers were necessary (Br., p. 12). Indeed, on the financial question KTHO is heard to contend — in contradiction of the Commission — that the Commission "would not be expected to articulate this rather routine exercise of expert judgment" in light of KOWL's alleged vagueness (Br., p. 36). This will be treated, *infra*.

permissible, the Commission Brief's treatment of the character question fails to justify the denial of an evidentiary hearing to the public and KOWL.

To KOWL's arguments on the character question (KOWL Br., pp. 11-22), the Commission's effort in this Court on KTHO's behalf is ingeniously inventive. It attempts, with assistance from neither KTHO nor the Order below, to explain that KTHO did not really intend what its words plainly said when it introduced the Commission to its contention that each signator represented a household of four (Br., p. 20); it provides the first non-KOWL interpretation of the language KTHO used to characterize forty-two "different detailed" letters (Br., p. 22); it avoids treatment of the KTHO surreptitious palming off, or disguising, of employees as members of the public (Br., p. 22); and constructs a *nun pro tunc* rationale explaining how affidavits from community leaders which flatly dispute the *substance* of KTHO's representations do not raise questions of KTHO's candor because, after all, although those people dispute the *nature* of the contacts KTHO said it had with them, they do not deny that they attended one or more meetings where KTHO had a representative present.⁸

The Commission's treatment here would dull the impact of the character questions by blending and merging the independent "character" qualification requirement of Section 308(b) of the Communications Act of 1934, as amended (Act)⁹ into the question of whether needs were adequately ascertained and responsive programming proposed. The Commission thereby implies it is prepared to exonerate applicants of the *independent* implications from character allegations, provided the applicant has complied with the requirements of the

⁸ "Finally, with respect to the contacts by KTHO with Messrs. Gianotti and Geach, the affiants merely disputed the nature of the contacts; they did not deny that they met at public meetings or elsewhere where KTHO was represented" (Commission Brief, p. 24).

⁹ "All applications . . . shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character . . . and other qualifications . . .", 47 U.S.C. §308(b).

doctrinal context, viz. the ascertainment efforts from which, in this particular case, character questions arise. Such a procedural approach results in emasculation of the statutory character qualification criterion.

Mindful of the Supreme Court's teaching in *F.C.C. v. WOKO*,¹⁰ the Commission skillfully seeks to circumvent its applicability here. As seen above, the Commission begins here by characterizing certain of KTHO's amendatory materials as the products of *carelessness*, not necessarily deception (Br., pp. 4, 8). Significantly, the Court-supplied rationale of the Commission and the strident arguments of KTHO both decline comment upon or explanation of the five persons who denied that the petition signatures attributed to them were in fact theirs (KOWL Br., p. 14).¹¹ Obviously, the Commission's new-found "carelessness" theory (to which KTHO has yet to subscribe) cannot easily be stretched to accommodate the question of repudiated signatures.

Taking the larger view, the Commission's obligation was to treat the factual allegations which bear on character in a concise, discernible manner.¹² Its attempt to supply in this Court a first time, possible rationale for its failure to do so not only is improper but has highly undesirable implications for the importance to be attached to character by the Commission in the future.

To the many cases KOWL cited in its Brief (pp. 5, 8, 9-11) on the critical independent importance the Commission has heretofore consistently

¹⁰ Rather than the *effect* of falsification or lack of candor on the success of an application, the "willingness to deceive" constitutes the gravamen of the offense. "The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones." 329 U.S., 223, 227 (1946).

¹¹ Compare the Commission's treatment in another case where it did make an effort to treat the allegations and ordered a hearing where the principal focus was whether one or more "ascertainment" contacts had been misrepresented. *Washington Broadcasting Co.*, 2 FCC 2d 952, 7 RR 2d 123.

¹² Surely, the passing contentions of the Commission (Br., p. 21) and KTHO (Br., p. 44), that certain sworn character factual allegations go only to the "weight" to be given cannot be well taken in light of the fact that there was *no* objective weighing below.

attributed to an applicant's character, its treatment here stands in vivid contrast. Here, the Commission implies strongly that it need not deal at all with the question of KTHO employees being represented as mere "members of the public" because it could not keep a hearing from being "lengthy":¹³

"[O]nly a business competitor, who is very concerned about new competition, would seriously suggest that these circumstances are 'clear evidence of outright misrepresentation' requiring resolution in a lengthy evidentiary hearing" (Br., p. 22).

Two short answers immediately suggest themselves: the Commission is presumed to be able to control its own proceedings (Cf. *Virginia Petroleum Jobbers Ass'n. v. F.P.C.*, 105 U.S. App. D.C. 172, 176n, 265 F.2d 364, 368n (1959)), and a hearing would only tend to be "lengthy" where *substantial* questions are present.¹⁴

This "palming off" of the employees is worthy of some elaboration. Essential to the way KTHO set about prosecuting its application for a full-time standard broadcast operating license was a demonstration that its full-time proposal would serve the *public* needs of the community and area. In this effort, KTHO concealed the true identities of its private (employee) supporters and used them to cast aspersions upon KOWL and to decry the lack of "choice." In the amendment under discussion (November 1, 1968), fully two-thirds of KTHO's employees were depicted, in KTHO's words, as mere "members of the public which support the KTHO full-time application and which express particular needs for KTHO's service" through petition signatures or letters. Moreover, without disclosure of his true status as a KTHO employee, Richard Green's

¹³ And because many more non-employees were contacted than employees. This last misses, of course, the point that the employees were not labeled as such.

¹⁴ Since KTHO has never supplied an explanation of how or why it so disguised its employees, no judgment could be made as to what kind of case it would present.

letter of October 16, 1968¹⁵ "respectfully requested that [the Commission] grant *their* (KTHO) application"; the letter continued:

"I feel very strongly that it would definitely be in the public interest to have KTHO's services available to the South Lake Tahoe area on a full-time, instead of just a part-time, basis. I know many people who do not have radios with FM and therefore are only able to receive broadcasts from one station at Tahoe. I think this is grossly unfair to deny many people the opportunity of a *choice* . . ." (Emphasis added, App. 83).

Curiously, KTHO employee and letter writer H. Robert Hampton¹⁶ and Mr. Wakeman, the father of KTHO employee Wakeman, also speak in terms of affording a "choice" to Tahoe listeners (App. 77, 80). In the ordinary course, these observations which touch on lack of FM receivers and the "grossly unfair" lack of choice when full-time AM service is available only from one station at Tahoe (*viz* KOWL), would be of material assistance to the Commission in reaching a determination as to KTHO's full-time AM proposal. The Commission was entitled to know there were private interests that may have motivated these observations from "members of the public," and when the knowledge was brought forth by KOWL, the Commission should have dealt with it.

The Commission would escape by arguing that the defects pointed out by KOWL, enunciated above, were apparent to its "experienced staff." If that is true, then the Commission's Order is the more subject to reversal. Assume, *arguendo*, that the "experienced staff" did in fact, as the Commission says here, note KOWL's allegations that sprinkled in with the general public and community leaders were two-thirds of the KTHO employees who signed the KTHO petitions and/or who sent letters (on non-KTHO stationery). Armed

¹⁵ Indeed, a letter written on stationery of an outside business interest (App. 83).

¹⁶ KTHO employee Hampton, also using an outside business letterhead, disparaged KOWL's operating standards, and even its employees (App. 77).

with that knowledge, how could it properly develop that the Commission's Order (para. 10) blandly finds that the November 1, 1968 amendment contained contacts with only the "general public and community leaders expressing support" for full-time KTHO? (App. 4).

So, too, the Commission's attempt to seek solace in *Broadcast Enterprises, Inc. v. Federal Communications Commission*, 129 U.S. App. D.C. 68, 70; 390 F.2d 483, 485 (1968), misfires because in that case this same appellate tribunal noted that since the Commission had brought to bear upon the "contradictory allegations and affidavits" a "rather detailed analysis" prior to judicial review, the Commission's ruling would stand unaltered by the Court. The Order produced by the Commission in this case is critically deficient.

For all these reasons, the Order should be reversed.

IMPORTANT QUESTIONS CONCERNING KTHO's ASCERTAINMENT SHOWING REMAIN UNRESOLVED

The ascertainment requirement, as interpreted by the *Minshall*¹⁷ doctrine, is intended to be a method whereby the Commission may satisfy itself that a given applicant is both cognizant of and *responsive* to the community needs and problems of the area of proposed service. Therefore, the Commission's *Minshall* doctrine requires an accounting of all significant community needs and problems ascertained *and* an exposition of the programming proposed to meet those needs and problems.¹⁸ The Commission's Brief lays stress on KTHO's efforts to comply with the former but largely ignores its failure to develop responsive programming. Since both the Commission and KTHO

¹⁷ *Minshall Broadcasting Company, Inc.*, 11 FCC 2d 796 (1968); KOWL Br., pp. 23-24.

¹⁸ The requirement is no less stringent for an existing licensee-applicant who proposes to serve a substantial amount of new area or population. *KTBS, Inc.*, 1 RR 2d 1054 (1964).

appear to misunderstand this aspect of the appeal, it will be succinctly restated.¹⁹

The concept of responsive programming evolving out of an ascertainment survey underlies the *Minshall* doctrine. Its four phases²⁰ thus contemplate a step-by-step progression from explanation of the manner in which the needs and problems were ascertained to a detailing of the programming derived as a result. This is so because without a set of specific, continuing programming proposals, themselves demonstrably responsive to the various needs and problems ascertained by an applicant, the Commission's *Minshall* doctrine would be reduced to a matter of form without substance.

On February 12, 1970, the Commission's Broadcast Bureau invited KTHO to further amend its ascertainment showing in accordance with the dictates of the *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 20 FCC 2d 880 (1969). The cornerstone of the *Primer* is the four *Minshall* phases. Over three years prior to that time, KTHO had, in its October 17, 1967 application, set forth a proposed programming format designed to meet the four general community needs and problems of which it was then cognizant (KOWL Br., pp. 26-27).

On April 9, 1970, KTHO submitted a final ascertainment amendment enunciating a wide range of significant community needs and problems which were not contained in the original application or prior amendments (KOWL

¹⁹ It is noted that while the Commission labors here (Br., p. 9) to convince that it did consider the KOWL allegations under this criterion (albeit silently), KTHO strives (Br., pp. 16-32) to show the Commission is "confused" (Br., p. 32 n. 4). KTHO appears to argue — the Commission's deficiency letters and its own multiple "ascertainment" amendments aside — that its application always complied with Commission requirements. But see, for example, the Commission's April 14, 1969 letter to KTHO (App. 105).

²⁰ The applicant is required to provide information (1) as to the steps taken to be informed of the real needs and interests of the area to be served, (2) as to the suggestions received, (3) as to the applicant's evaluation of those suggestions, and (4) as to the programming proposed to meet those needs. (*Minshall, supra.*)

Br., pp. 27-28). The proposed *programming* format, however, remained substantially unrevised. The hours to be devoted to entertainment (musical broadcasting) were not altered; the hours and minutes to be devoted to news, public affairs and other programs (exclusive of entertainment and sports) (KOWL Br., p. 27) were also not amended from 1967 levels. KTHO did indicate "Ask Your City Manager," an avowed *weekly* (KTHO Br., p. 29) public affairs broadcast had been *cancelled* and would be substituted for with unnamed "specials" of unspecified frequency. But not one minute of additional normal weekly air time was taken away from "entertainment" on the program schedule in order to fill all those public needs so laboriously detailed in the opposing KTHO Brief (pp. 26-27).

The Commission simply did not treat the KOWL allegations to the effect that the newly ascertained needs would not be met by responsive programming on any regular basis.²¹ Nowhere did the Commission deal with the question of the propriety of allowing a stale proposal to remain unrevised in the face of massive amendments to the very material upon which that proposal was said to be predicated. Reliance upon a programming format some three years out of date is, at the least, tentative evidence that the amended KTHO showing on ascertainment impermissibly sought to fortify preconceived attitudes toward the kinds of programming it would employ. Consistently since 1960, the Commission has stated that "pre-planned program format submissions accompanied by complimentary references from local citizens" are *not* acceptable. *Report and Statement of Policy Re: Commission En Banc Programming Inquiry*, 25 F.R. 7291; 20 RR 1901 (1960). The Commission, however, would not deal with the allegations before it.

The Commission further failed to require any showing on how KTHO's existent (full-time) FM station was serving any unsatisfied community needs

²¹ The Commission strays from the record to obtain program percentage data from KOWL's 1968 renewal of license application, and it cites a two commissioner minority view on minimal such percentages (Br., pp. 15-16). One of those commissioner's dissents here (Johnson), the other is no longer with the Commission (Cox.)

and problems. It is too late for the Commission to ignore KTHO's FM service while attempting to stress the public importance of "white area" (Br., p. 6). On June 12, 1968, the Commission sent a letter to KTHO which acknowledged the service area and "white area" contention but said:

"We note, however, that the entire area [to be served] is very mountainous and that the vast majority of these people reside in South Lake Tahoe, which does receive primary service from station KOWL. In addition, we note that your FM station (KTHO-FM) which is licensed to operate unlimited time, serves much of the area which would be served by your proposed [AM] operation." (App. 57.)

The "white area" is not said to be more important now than it was in June, 1968, and the fact of KTHO's FM service is no less important.

For these reasons, the Commission's Order should be reversed.

FINANCIAL QUESTIONS HAVE BEEN BRUSHED ASIDE AND A NOVEL TEST APPLIED

In its main Brief KOWL showed: that the Commission was never told what were the estimated incremental expenses attributable to first-year cost of operation for the full-time AM operation (and consequently made no finding that such were reasonable); that no supportive cost of operation showing was made on this record and that KTHO's financial statements were impermissibly stale (Br., pp. 29-33).

In the Commission's Brief it is stated: that the Commission did determine the projected incremental expenses *were* reasonable; that the Commission made a finding or conclusion that the KTHO operating expenses did not appear unreasonably *low*; and that the Commission found the first-year estimated revenue (\$105,000) and expenses (\$90,000) were not *contradicted* by KTHO's undisclosed financial reports (Br., p. 27).

To all of this, KOWL responds that the Commission's *Order* fails to show those findings, and it does not speak in terms of "contradiction." The past, undisclosed KTHO financial reports, covering daytime AM only or daytime AM and full-time FM, by definition cannot logically support a proposal for the prospective full-time FM-AM operations, and reliance upon them is patent error. If historically the KTHO expenses exceed \$90,000 per year, *that* fact would not support the full-time proposal. If past expenses were less than \$90,000, how much less were they in order to make the \$90,000 figure reasonable? What is it that requires the Commission not to indicate, at least, a range of reasonableness? As KOWL has consistently pointed out, there is no statement in this record showing what the incremental full-time KTHO operating expenses are estimated to be, and of course there is no itemized breakdown of them. Until these facts are known, the burden of showing they are unrealistic cannot, as the Commission would have it, shift to any other party.

The Commission in its Brief, but *not* in its Order, picks up as a rationale, the Commission Executive Director's dictum to the effect that KOWL could have brought forward its own full-time expense history to demonstrate a disparity with KTHO's estimated expenses of full-time AM operation (Br., p. 28). If the Commission were serious in this contention, it could and should have answered itself by simply looking in its own files for the complete Annual Financial Reports (FCC Form 324) KOWL has filed with it through the years. The sales and expenses of KOWL are there broken down into minute detail and the Commission knows this. As noted (*supra*. p. 11n), the Commission was not hesitant in looking up and using extra record facts from the KOWL files when it suited its purpose.²² Before the KOWL and KTHO nighttime revenues and expenses can effectively be compared, however, KTHO must

²² Had the Commission taken the trouble to look at its records of KOWL's higher expenses of operation (for that *one* station) it surely would not, it is respectfully submitted, have made the contention under discussion.

come forward with the cost of operations breakdown demanded of applicants since long before the KTHO grant (KOWL Br., p. 43).²³

The Commission's basic response to its cited failure to make proper findings on the financial issue seems to be found in its theory that it has a "realistic eye strengthened by experience gained" from other licensing actions and from preparing statistics to put in its annual reports to Congress (Br., p. 26). (Intervenor lauds the Commission's "expertise" which enables it to judge the reasonableness of projected expenses (Br., p. 36).) But no cogent reason has yet been given this Court as to why the fact findings of this "realistic eye," this "expertise," could not be articulated in the Order.

To shore up its conclusion the Court and parties are told by the Commission that it found financiability on the basis of its "net worth" test (Comm. Br., pp. 29-31), citing *Springfield Television Broadcasting Corp.*, 2 RR 2d 843 (1964). The short answer is that there is no such test. It is true that in 1964, the net worth figures of a Mr. Overmeyer and his warehousing company were cited as financial support for Mr. Overmeyer's television application. But that was a determination by an employee panel (Review Board) and the determination was not passed upon by the Commission. Further, since long before KTHO's application was filed, and consistently thereafter, the Commission has insisted²⁴ on a showing of "current and liquid" assets and has rejected mere showings of "net worth."

²³ The record does show that nighttime revenues available are inadequate to support KOWL's nighttime service (App. 95). It also is true that KTHO has hired an additional full-time employee (KTHO Br., p. 29), but neither that fact nor any other which may have occurred since October, 1967 has caused KTHO to raise (or the Commission to inquire into) the \$90,000 first-year operating expense figure.

²⁴ See KTHO Application of October 17, 1967, Instructions to Financial Qualifications, Section III, p. 2, para. 4(d) (App. 25). See also currently effective Instructions to Financial Qualifications, Section III, p. 3, para. 4(b) (App. 194). "A mere statement of total assets and total liabilities or a statement of net worth" is unacceptable to permit a determination of current financial position. A showing of "current and liquid" assets is required to assess the ability of an applicant to support the first year of operation.

Mr. Overmeyer used his net worth and that of his warehousing company to demonstrate financiability of other television permits as well as the one involved in *Springfield*. On September 4, 1970, the Commission ordering a hearing into the sale of those other Overmeyer permits, *In the Matter of D. H. Overmeyer Communications Co., Inc.*, 25 FCC 2d 442; 20 RR 2d 1 (1970) and appended the Report of the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce on Acquisition and Transfer of Five Overmeyer Television Construction Permits, H.R. Rep. No. 91-256, 91st Cong., 1st Sess. (May, 1969) (herein the "Report"),²⁵ which Report severely criticized the failure of the Commission to probe financiability. The Report shows that following the Commission grant, the warehousing company developed an "urgent need" for money and Mr. Overmeyer's television company was in "financial distress." The Report found that:

" . . . with respect to both this transfer and the initial [construction permit] grants, when discrepancies developed or facts were lacking in Overmeyer's applications, the Commission failed to require evidentiary hearings prior to making its determination" (Report, part "D"). 5 RR 2d at 6.

Here, the "net worth" referred to is the combined net worth of the stale 1968 balance sheets of KTHO's principals, Messrs. Breckner and McBain (Br., pp. 28-31); the net worth of the KTHO licensee is a deficit \$70,135 (App. 3). Still, the Commission would not probe, and it waited until it reached this Court to announce it had adopted in this case the 1964 Review Board's "net worth" test. A matter of such landmark concern to thousands of applicants for major changes in facilities and for renewal of broadcast licenses clearly should have been set forth in the Order. Indeed, such a shift in policy warranted a major policy statement, with attendant publicity.

²⁵ The Report is not attached to the advance FCC 2d reports, but is appended at 20 RR 2d 5.

The Commission argues that KOWL is forbidden to cite *Northwestern Communications Corp.*, 23 FCC 2d 444 (1970) in support of its argument that the KTHO financial showing (1965 and 1968) is out of date and unreliable. The Commission, in contending that the *Northwestern* case was released in time to form a basis by KOWL for reconsideration, overlooks at least two points. KOWL made that argument to the Commission in its Petition to Deny filed April 1, 1968 (then the financial showing was seven months old). In its Brief (p. 33), KOWL cited a 1968 case for the same proposition (*Jackson Missouri Broadcasting Co.*, 14 RR 2d 445). If the KOWL initial Brief were to be drafted anew today, an even more recent case from the full Commission would be cited. In a Memorandum Opinion and Order released October 28, 1970, the Commission said *only this*, in the question of the currency of an applicant's financial showing:

4. "Since L and L Broadcasting Company has failed to keep its financial showing current, it will have to establish its qualifications in hearing. Thus, a financial issue with respect to this applicant will also be included."²⁶

No reason has been advanced to warrant a different standard for KTHO's two-and-a-half-year-old showing. Here, as in every case, the twin burden was upon the applicant to demonstrate his qualifications and to keep his application current.²⁷ The burden was not shouldered, and the Commission's Order should be reversed.

²⁶ *Edward G. Atsinger III*, Docket No. 19068, FCC 70-1133, No. 52978, mimeo para. 4.

²⁷ Before the Commission KOWL contended that KTHO's two principals, Messrs. McBain and Breckner, had obligations to a different applicant (Crown City) in the nature of \$70,000 each. The Commission found that KOWL had not sufficiently proved that those obligations were in excess of the \$53,000 each that KTHO reported in 1965 (App. 3). In view of the language used by KTHO at pages 39-40 of its Brief to support the \$53,000 figures, KTHO is challenged to respond at the time of argument in this appeal to this question: Is it not a fact that present counsel for KTHO filed Proposed Findings of Fact and Conclusions of Law on March 14, 1968, on behalf of Crown City wherein the initial contributions of Messrs. McBain and Breckner were therein said to be \$5,000 each and that they were said there later to have paid, or obligated themselves to pay, additional sums in

(Cont'd)

CONCLUSION

This appeal represents another of those cases where the Commission has failed to articulate the findings of fact underlying its disposition of factual allegations timely and properly raised before it. That failure is not cured by now offering this Court various decisional rationales to support the Order's bare conclusions. Indeed, the Commission's stalwart efforts here merely underscore that failing.²⁸ Certain of the rationales offered demonstrate, in fact, a need for resolution of the questions in evidentiary hearing.

In sum, the Commission should not be permitted to substitute now for the Order's void, or to bar proper Court review of its action. Other agencies are held to the requirement that the findings be set forth before judicial review. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167, 168 (1962); *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 197 (1941); *FPC v. United Gas Pipe Line Company*, 393 U.S. 71, 73 (1968); *Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968). So, too, is this Commission *WAIT Radio v. F.C.C.*, 135 U.S. App. D.C. 317, 418 F.2d 1153 (1969); *West Michigan Telecasters, Inc. v. F.C.C.*, *supra*; *Southwestern Operating Co. v. F.C.C.*, 122 U.S. App. D.C. 137, 351 F.2d 834 (1965).

²⁷ (Cont'd) order to bring their respective interests up to 14 per cent (*Id.*, para. 465 and notes 23 and 24), and that the financial commitments of both Mr. McBain and Mr. Breckner in addition to their original contributions were said to be \$63,000 each? (Findings, paras. 465 and notes 23 and 24, 468, 470, 474).

²⁸ It is not believed that the Court will be misled by the many times KTHO strays beyond the record, and with no attempt to cite to it, in order to introduce new "facts." (Example: "the small incremental expense of extending an existing radio operation into night hours" (Br., p. 37); nor by the KTHO attempt to portray KOWL's allegations as being "dismissed" by the Commission below (Br., p. 8)). The Order purported on its face to treat those allegations as presenting serious questions, but the treatment itself was defective.

The Order appealed from should be reversed and the case remanded with instructions that a hearing be held on the substantial and material matters raised below.

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